

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF COCHISE

3

4 RODNEY AND GLORIA OLSON,)
)
5 Plaintiffs,)
)
6 vs.) No. CV201600084
)
7 CHULA VISTA HOMEOWNERS)
 ASSOCIATION,)
8)
 Defendant.)
9 _____)

10

11 August 14, 2017
12 Bisbee, Arizona

13

14 BEFORE: The Honorable CHARLES A. IRWIN, Judge

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS
16 BENCH TRIAL DAY 1

17

18 APPEARANCES:

19 FOR THE PLAINTIFFS:
20 Robert Stachel, Attorney at Law

21 FOR THE DEFENDANT:
22 Jason Smith, Attorney at Law
23 Nathan Tenneson, Attorney at Law

24 Reported by:

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I N D E X

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1 P R O C E E D I N G S

2 THE COURT: This is in the matter of Olson versus
3 Chula Vista Homeowners Association, CV201600084. Time set
4 for the trial of this matter. Mr. Stachel is present
5 representing plaintiffs Rodney and Gloria Olson, who are
6 both present. Good afternoon.

7 MR. STACHEL: Good afternoon, your Honor.

8 THE COURT: And Chula Vista represented by -- we
9 have Mr. Smith?

10 MR. SMITH: Yes, your Honor.

11 THE COURT: And Mr. Brown?

12 MR. TENNESON: Mr. Tenneson, your Honor.

13 THE COURT: Mr. Tenneson. All right.

14 Representing the Chula Vista Homeowners Association. A
15 number of people in the audience I assume are members of the
16 board. You want to tell me who's here on behalf of the
17 board?

18 MR. SMITH: There are a number. We'll start with
19 Debbie Cunningham.

20 MS. CUNNINGHAM: Yeah, I'm Debbie Cunningham, the
21 secretary with the homeowners association.

22 MR. SMITH: Mark Butler.

23 MR. BUTLER: I'm Mark Butler. I'm the president
24 of the homeowners association.

25 THE COURT: Thank you.

1 MS. LONG: Fran Long. I'm the vice-president of
2 the homeowners association.

3 THE COURT: Thank you. And those are the members
4 of the board that are present. Thank you.

5 And the court is aware that at the parties have
6 filed their joint pretrial. I reviewed that, including the
7 list of witnesses and exhibits.

8 I'm also aware that there has been filed a
9 stipulation to dismiss Count 1 of the complaint. And I've
10 reviewed that as well. As there have been no objections in
11 the pretrial statements as to either parties' exhibits, am I
12 to understand then that there are no objections; and we can
13 indicate that all exhibits are going to be marked in
14 evidence?

15 MR. STACHEL: That's correct, your Honor. We have
16 prepared trial books. The court has a trial book in front
17 of it. And we also prepared and filed with the court today
18 another list of exhibits which took care of duplications
19 that both parties had in their ultimate exhibit list.

20 THE COURT: The trial book I have here just says 1
21 through 50, which I assume is just plaintiffs.

22 MR. STACHEL: No, it's joint, it's everyone.

23 THE COURT: It's everything?

24 MR. STACHEL: Yes, Judge.

25 THE COURT: So the list of exhibits that you filed

1 today is a combined list of all exhibits.

2 MR. SMITH: Yes, your Honor.

3 THE COURT: Okay. Thank you.

4 Any opening, Mr. Stachel?

5 MR. STACHEL: Thank you, your Honor. Just very
6 briefly. The court has heard from the joint pretrial
7 statement this is an issue where the Olsons are homeowners
8 in Chula Vista subdivision. They own a nine-acre parcel
9 within that development.

10 They decided in 2009 to present a development plan
11 for their nine-acre parcel, which included a 6,000 square
12 foot structure, steel structure, and then to be followed
13 behind with a construction of another private dwelling,
14 another structure as a private dwelling.

15 In 2011 the Olsons approached the association
16 after having built the 6,000 square foot structure and asked
17 for permission to reside in the structure temporarily while
18 they still made plans to complete their other primary
19 residence; due to factors outside their control, the
20 economy, some other issues which the court will hear about.

21 The Olsons during the 2011 time period were
22 denied, in February of 2011, the opportunity to occupy their
23 place, their 6,000 square foot structure as a dwelling, a
24 temporary dwelling. Primarily the reason stated was that
25 the primary dwelling was, um, or, pardon me, that the

1 temporary dwelling did not comport with Section 8 of the
2 protective covenants which said you had to live in a trailer
3 or mobile home for a period of no less -- or no greater than
4 than, I think it said nine and then later it was 12 months.
5 Ultimately, the Chula Vista HOA granted the Olsons a
6 three-year variance to reside in the structure.

7 And then once that had expired, later in 2014 and
8 into 2015, the Olsons decided to stay in that particular
9 unit and use that particular home, the 6,000 square foot
10 home they were living in, as their primary dwelling. This
11 was not acceptable to the association. And the rationale
12 behind the association's denial of the Olsons' request,
13 after the conversion and then moving into this 6,000 square
14 foot home, was that it was not first class site-built
15 according to Section 2 of the protective covenants.

16 As the court has noted the stipulation with Count
17 1, the dismissal of Count 1 came with the stipulation as to
18 a fact that the parties have agreed that the 6,000 square
19 foot structure is site-built.

20 So today, your Honor, we're here to determine
21 whether Section 2 of the CC&Rs, which talks about whether
22 the 6,000 square foot dwelling is first class is whether
23 it's vague or ambiguous, or whether its original intent
24 would have encompassed the construction of the structure
25 that the Olsons' currently reside. Thank you, Judge.

1 THE COURT: Thank you.

2 And Mr. Smith.

3 MR. SMITH: Thank you, your Honor. I'll be very
4 brief. My role here primarily is to defend against the
5 three remaining counts in Mr. Stachel's complaint. We think
6 those are primarily legal arguments. And really they are
7 ancillary to the primary issue in this case which is an
8 equitable claim before the court to keep the house on the
9 Olsons' part and on the part of the association to do
10 something about the warehouse or the primary residence that
11 was proposed to be built at the juncture.

12 These legal claims that I'm dealing with in the
13 complaint don't have a lot of facts that need to be provided
14 to the court. We will make some legal arguments to the
15 court in closing explaining the facts and why these counts
16 don't -- um, why the Olsons' should not prevail on those.

17 But that doesn't answer the ultimate question for
18 the court, which is what to do with this ongoing dispute
19 about the enforcement of the protective covenants. And for
20 that I will leave it to Mr. Tenneson to discuss the
21 equitable part of the case.

22 THE COURT: Thank you.

23 Mr. Tenneson.

24 MR. TENNESON: Thank you, your Honor. Um, the
25 case at issue today is if the property, if the Olsons'

1 property and the building built on, thereon is in compliance
2 with Section 2 of the Chula Vista's restrictive covenants.
3 As Mr. Stachel indicated, that comes down to is it a first
4 class dwelling or not.

5 Under Arizona law CC&Rs are a matter of contract,
6 and contract is interpreted by the judge. And Mr. Smith
7 said, um, there's not necessarily many facts involved in the
8 legal determination. But there are some facts that we'll be
9 going over. And you'll be hearing testimony from, um, the
10 board regarding just the history of what has been going on
11 here.

12 I think there's particularly two cases that will
13 be useful to the court in this case. The first is called
14 *Tierra Ranchos vs. Kitchukov*. And in that case the Arizona
15 court determined that an association is required to use it's
16 discretionary powers in a reasonable manner. And as we're
17 hearing evidence and testimony from the association, I think
18 the court will see that the association and the board have
19 acted reasonably in the exercise of their discretionary
20 powers under the architectural provisions of the
21 association.

22 The second case is a little more similar to the
23 case today. And it's called *Flying Diamond Park vs.*
24 *Meienberg*. Similar facts in that case. Mr. Meienberg
25 had -- Flying Diamond was an airpark, or is an airpark. And

1 Mr. Meienberg owned a lot therein, and he was constructing a
2 building. And the airpark CC&Rs said that all buildings
3 could not exceed 22 feet in height. Mr. Meienberg got the
4 approval for a building that was 22 feet.

5 And upon completion of the construction he brought
6 in some extra vents that added 16 inches to the building.
7 So it was about 23 feet. And a lawsuit ensued over whether
8 that was a violation or not. And the determination there is
9 today the court sits in equity; and under equity the court
10 has to consider multiple variables including but not limited
11 to relevant hardships and misjustice, public interest,
12 misconduct of the parties, and delay if any on the part of
13 the plaintiffs.

14 And, more interestingly, in *Flying Diamond Airpark*
15 the court held that the extra space on the building was in
16 violation, and they entered an injunction requiring
17 Mr. Meienberg to comply. And, furthermore, the appellate
18 court held that any party that's on notice of the
19 restrictions prior to them taking an act in violation is not
20 entitled to the balance of hardship in their favor. They
21 have to go without that. That's a main holding of *Flying*
22 *Diamond Airpark*. And if I may approach, I do have a copy
23 for the court.

24 THE COURT: Great. I was about to ask you for a
25 cite. I did review the two cases you cited in the pretrial

1 statement, *Tierra Ranchos* and the *Powell v. Washburn* case.

2 Please, could I have a copy of that? That would be great.

3 MR. TENNESON: Yes, your Honor.

4 THE COURT: Thank you.

5 MR. TENNESON: Thank you, your Honor.

6 THE COURT: And with that, if there's nothing
7 further, plaintiff call your first witness?

8 MR. STACHEL: Yes, your Honor. May we excuse or
9 exclude other witnesses in this matter?

10 THE COURT: Has the rule been invoked?

11 MR. STACHEL: I would like to invoke the rule, if
12 I may please.

13 THE COURT: If the rule is being invoked, which
14 apparently it is, then all who are going to be witnesses in
15 this matter -- now is it the plaintiffs' position that all
16 board members are to be excluded; or not?

17 MR. STACHEL: Your Honor, I'm asking that the
18 board designate a person to be the representative of the
19 board. The board doesn't have to necessarily have all the
20 board members present to participate.

21 THE COURT: And I believe we have three board
22 members present. Mr. Smith, your position on if the rule is
23 invoked, then the board members, do you designate one and
24 excuse two; or all three stay?

25 MR. SMITH: Your Honor, the preference would be

1 they all stay. But if you say that only one can -- although
2 I'm not sure we're going to use all of them as witnesses
3 anyway.

4 THE COURT: Well, that may solve the problem, if
5 you want to figure out quickly who you're going to use and
6 who you're not.

7 MR. SMITH: Okay.

8 THE COURT: But you would like to include all
9 three, so I'm going to have to make a ruling on that.

10 And, Mr. Tenneson, your position?

11 MR. TENNESON: Um, your Honor, I believe of the
12 board members we do have, I think only Ms. Debbie Cunningham
13 will be testifying at this time. I believe the other two
14 will not be testifying.

15 THE COURT: Very well. And if I grant
16 Mr. Stachel's request to first invoke the rule and limit the
17 board to one representative, who would the representative
18 be? Probably one of the testifying witnesses? Or the non-
19 testifying witness?

20 (Discussion off the record between counsel.)

21 MR. TENNESON: Non-testifying, your Honor.

22 THE COURT: All right. So the board's going to
23 designate who?

24 MR. SMITH: Mark Butler.

25 THE COURT: Mr. Butler as the president --?

1 MR. TENNESON: Yes, your Honor.

2 THE COURT: -- of the association as their
3 witness. Then all other witnesses -- now the other, Mr.
4 Butler and the other board members who are present but will
5 not be called do not need to come forward. We'll need just
6 a -- I guess I'll need the list that was filed today. They
7 had a list in the pretrial statement, but I believe it may
8 be modified.

9 So I have Mr. and Mrs. Olson; you'll need to come
10 forward.

11 Is James McRoy present? He'll need to come
12 forward.

13 Ms. Cunningham, you'll need to come forward.
14 Albert Suhajda?

15 MR. SMITH: We're not going to --

16 THE COURT: You're not calling Mr. Suhajda?

17 (Discussion off the record between counsel.)

18 THE COURT: Mr. Butler, is he going to be called?
19 Mr. Butler is not called? Okay. And Robert Covalucci?

20 And Fran Long is not going to be called. She's
21 the other board member?

22 All right. Come forward and give your name to the
23 clerk.

24 THE COURT: All right. So we have the plaintiffs.
25 And we have four witnesses for the association. Are we

1 good?

2 MR. SMITH: One moment, your Honor.

3 Debbie, can I talk to you?

4 (Discussion off the record.)

5 MR. SMITH: Your Honor, if we may, I would like to
6 request to make a change, to designate Debbie Cunningham as
7 the board representative so that she can stay in.

8 THE COURT: All right. So she's going to be
9 staying. But she's still going to be sworn, so you stay up
10 front.

11 And have you decided if you're going to call any
12 other witnesses?

13 MR. SMITH: No, your Honor.

14 MR. TENNESON: No, your Honor.

15 THE COURT: Okay. And so the nondesignated board
16 members who will not testify will not be excluded from the
17 courtroom.

18 MR. SMITH: Correct. Thank you, your Honor.

19 THE COURT: I was wondering when you were going to
20 catch that little nuance.

21 All witnesses and parties, please raise your right
22 hand; and we'll swear you in.

23 (Proposed potential witnesses are duly sworn by
24 the clerk.)

25 THE COURT: All right. Let me have Mr. and

1 Mrs. Olson; you can take your seat.

2 The rest of you, stay here. I need to give you
3 some instructions.

4 The rule of exclusion has been invoked, which
5 means that you will be outside of the courtroom and not
6 present to hear any testimony until you're called to provide
7 your testimony. You're also instructed that you will not be
8 discussing your testimony with any of the other witnesses or
9 with anybody other than the attorneys prior to your
10 testimony and up until you are excused from the rule.
11 Because our courtroom speaker system is like it is, the
12 bailiff will direct you to the opposite side of the lobby
13 where you'll remain until you're called to provide your
14 testimony. Do all of you understand?

15 GROUP RESPONSE: Yes.

16 THE COURT: So I'll excuse you all at this point
17 except for Mrs. Cunningham. You may remain as the board's
18 designated representative. So you may remain in the
19 courtroom. But the other three must leave.

20 We've had a few other people come in, Mr. Stachel.
21 Are they other witnesses on your part?

22 MR. STACHEL: No, your Honor.

23 THE COURT: Very well. The first witness for the
24 plaintiff.

25 MR. STACHEL: Debbie Cunningham, Judge.

1 THE COURT: In the meantime the rule -- or the
2 record will reflect that the witnesses have been excused
3 from the courtroom.

4 You can adjust that microphone for your heighth.
5 Pull it up and speak into the microphone, if you would.

6 Go ahead, please.

7 MR. STACHEL: Thank you.

8

9 DEBORAH CUNNINGHAM

10 called as a witness herein, being first duly sworn, is
11 examined and testifies as follows:

12

13 EXAMINATION

14 BY MR. STACHEL:

15 Q Thank you. Please state your name for the record.

16 A I'm Deborah Jane Cunningham.

17 Q And, Ms. Cunningham, you've been identified as a
18 representative of Chula Vista Homeowners Association today,
19 is that correct?

20 A That's correct.

21 Q And what is your position with the association?

22 A I'm the secretary.

23 Q Are you also on the board of directors?

24 A I am.

25 Q How long have you -- well, let me ask, do you live

1 in Chula Vista?

2 A I do.

3 Q How long have you lived there?

4 A Since 2008.

5 Q How long have you been on the board of directors?

6 A I've been on the board three times. I was on the
7 board of directors from 2005 to 2007. Then I served again
8 from 2009 to 2011. And then I came on the board in May 2015
9 when the then secretary had to leave for health issues. And
10 I've served since then.

11 Q So in 2005/2007 you didn't live there, but you
12 were on the board?

13 A I owned the land. I bought the land and then was
14 on the board.

15 Q Are you in any particular business?

16 A I am a realtor.

17 Q I was wondering. I drove out there, and I saw
18 your sign on a few properties.

19 A Yes.

20 Q So you've listed and sold properties in Chula
21 Vista?

22 A I have indeed.

23 Q How many?

24 A How many? Hmm, um, gosh, I don't know. Um, one,
25 two -- six. Nope. Maybe eight or nine.

1 Q Almost 10?

2 A Possibly. I'm thinking, I'm thinking of them in
3 my head. But it's been over several years.

4 Q Is it safe to say that you're pretty knowledgeable
5 about the development?

6 A Yes, indeed.

7 Q Let me ask you a little bit of history with regard
8 to the HOA itself. Do you know when the HOA began?

9 A Yes.

10 Q When was that?

11 A 2003.

12 Q Okay.

13 A Um, okay, the history then; um, the subdivision
14 was put together by the developer, Mr. Martin, in 1999.

15 Q Okay.

16 A When a certain amount of parcels had been sold,
17 then it would have to go to the homeowners association. And
18 that happened late summer 2003. And then the homeowners
19 association board was put together. Their first meeting,
20 when that happened, I believe was in October. And then
21 their very first homeowners association meeting was in
22 December.

23 Q Of 2003?

24 A 2003, I believe.

25 Q Now the HOA itself as a corporation was formed in

1 2000 though, right?

2 A Correct.

3 Q By Mr. Martin?

4 A Yes.

5 Q So what you were referring to was the transition?

6 A Correct.

7 Q So before you you have a three-ring binder. It's
8 got tons of documents in it. And you, being the secretary,
9 even though these are all admitted, I'm sure the court would
10 like to know what's there. So we're going to talk a little
11 bit about some of these, and we're going to have to come
12 back and refer to them. And we'll go through it rather
13 quickly because we're not going to be reading them as we go.

14 A Okay.

15 Q The first item, Number 1, is the 1999 protective
16 covenants. I believe you stated a moment ago that that's
17 approximately when the development began. Is that right?

18 A That's correct.

19 Q And these were recorded -- and we need to make
20 sure we're clear on this -- as a separate document called
21 protective covenants. Is that right?

22 A Correct.

23 Q And Item Number 3 -- or 2, pardon me, is the
24 declaration of trust because when we see that these
25 documents are signed, they're actually signed by Fidelity

1 Title. Right?

2 A Right.

3 Q Okay. Because the Fidelity had the development in
4 trust.

5 A It was in trust.

6 Q And Item Number 3 are amendments. And, however,
7 this one appears to be more like a traditional deed
8 restrictions; would you agree?

9 A This is the 2007?

10 Q No. These are --

11 A Which ones?

12 Q 2000.

13 A 2000. Okay.

14 Q If you look at the bottom, I just want to make
15 sure we're clear on this. On Item Number 3 the recording
16 number is 0001, looks like 00569, or something like that.
17 Do you see that?

18 A Yeah, I do.

19 Q So this was recorded; and you can tell in the
20 upper right-hand corner of page one?

21 A Yeah.

22 Q Is, uh, looks like January of 2000 is when it was
23 recorded.

24 A Yes. Yeah, yeah.

25 Q All right. And then we go to Item Number 4. And

1 now we have protective covenants again. And do you
2 recognize this?

3 A I don't really see the date on that one.

4 Q On the bottom of the page you can see the serial
5 number. And the instrument number -- the first two digits
6 at the recorder's office in those days, '01 would have been
7 the year? '09; the month?

8 A Right.

9 Q Are you with me?

10 A Yes, I am, yeah. Sorry. I'm just looking at
11 them.

12 Q So these are January of -- pardon me -- September
13 of '01.

14 A Right.

15 Q Okay. And these are what's called the 2001 -- we
16 refer to these as the 2001 amendment?

17 A Right.

18 Q Okay.

19 Moving on, we have the 2002 amendment. Do you see
20 that?

21 A I do.

22 Q And this was also done by the developer. In fact,
23 all of these so far have been done by the developer, is that
24 right?

25 A Correct.

1 Q Next we have Item Number 6, a recording in April
2 of '04 -- pardon me -- March of '04. Do you see that?

3 A I do.

4 Q This was also recorded by the developer, but it
5 was rerecorded to add exhibits.

6 A Correct. The electricity?

7 Q Yes.

8 A Yeah.

9 Q Okay. Quick question. You mentioned that the
10 board of directors took over in December of '03. Why did
11 the board of directors not authorize the recording and
12 instead the developer did?

13 A I have no knowledge of that. I wasn't here in
14 2003/2004.

15 Q That's fine. Are you aware of any document
16 recorded by the developer or the homeowners association
17 identified as a declaration of transition or a transition
18 document where control of the homeowners association would
19 go from the developer to the board of directors?

20 A Um, the only thing I can think of would be the
21 articles of incorporation. Within that there was a -- if
22 you look at the first page of the articles of incorporation,
23 they state that the transfer is going from the declarant to
24 the homeowners association. There may be other documents.
25 I would have to look through my file.

1 Q Were you aware of any off the top of your head?

2 A Not offhand.

3 Q I don't like to skip forward, but we will. If you
4 go to 14, Exhibit 14, is that the articles you're referring
5 to?

6 A Yes. That's the only one I'm aware of at this
7 point.

8 Q Now this particular article, however, this one was
9 still the original recorded or done in 2000 -- or pardon
10 me -- 1989. If you look at the statutory agent on Article
11 IV, it says Donald Martin. Is that the developer?

12 A Yes, it is. It's, actually, now that you mention
13 that there are documents, where it transferred to Robert
14 Covalucci.

15 Q Do you have any idea when those were filed?

16 A I do not. Not offhand.

17 Q That's fine. And now I'm going to turn to Number
18 7. Number 7 is an exhibit that looks like it was recorded
19 July 14th of '04. Do you see that?

20 A I do.

21 Q Okay. And this one appears to have been signed,
22 as far as courtesy recording instruction on the first page,
23 you know, I can barely read it, but I've been around. Is
24 that Earl McCabe's signature?

25 A I believe that's Earl McCabe

1 Q So Earl signed that one to get them recorded. In
2 fact, his name appears on the next page on the bottom of the
3 page; is that right?

4 A Right.

5 Q And this is Exhibit 7.

6 Now this would have been, if I'm understanding
7 this, this would have been an amendment to the deed
8 restrictions to the CC&Rs or protective covenants performed
9 by the HOA, its members, owners, and so forth. Is that
10 right?

11 A Correct.

12 Q So this would have been the first document done
13 after the developer had ceased control to the HOA, is that
14 right?

15 A Correct.

16 Q And do you recall the only item amended on the
17 CC&Rs for this recording?

18 A They amended the wording of Part 2 in the
19 protective covenants.

20 Q So when you're looking at Exhibit 7, this would be
21 on the recording pages that you look at. At the bottom
22 right it says 14 of 19. Do you see that? Or it would be
23 the Olson Bates Number 232 at the bottom of the page.

24 A I see it.

25 Q Okay. So you're saying that paragraph two was

1 changed?

2 A Correct.

3 Q Now Paragraph 2 -- and sometimes referring to
4 these recorded documents are a little hard to read. But I
5 prepared for the court and the convenience of the parties a
6 comparison. And it is actually the very last document in
7 the book.

8 Judge, I would ask you -- it's at the very, very
9 end.

10 THE WITNESS: Okay. Found it.

11 MR. STACHEL: Your Honor, can I bring the easel
12 over? This thing? I'm hoping it might make it easier.

13 BY MR. STACHEL:

14 Q To understand what was changed -- I hope everybody
15 can see that. To understand what was changed in Paragraph
16 2, when you look at Exhibit 7, and at page 14, you're seeing
17 the bottom, right here. Would you agree?

18 A Yes.

19 Q So this is what I want you to look at. And you've
20 had a chance to look at Paragraph 2 over the years, right?

21 A Rather, yes.

22 Q So we may not have to go back and forth if you can
23 recall this.

24 A Okay.

25 Q So in 2000 -- or pardon me. In 1999 the developer

1 came up with a protective covenant. And Paragraph 2 reads
2 as this does. Is that correct?

3 A Yeah.

4 Q Okay. And when we look at it it talks about, for
5 example, restrictions on mobile homes, trailers, A-frames,
6 that kind of thing. Okay?

7 A Correct.

8 Q And there's a section, it says this restriction is
9 not intended to exclude manufactured or modular homes
10 provided that they are 1998 or newer in age and, further,
11 that they are set at ground level. Do you see that?

12 A Yes.

13 Q Okay. And so in 2001 the developer made a change.
14 Do you see the change?

15 A Yes.

16 Q He changed it from 1998 to 2000.

17 A Correct.

18 Q Did he make any other change in the 2001 amendment
19 to Section 2?

20 A Um, I don't believe so.

21 Q Okay. And if you need to go back and verify that,
22 we certainly can. We have time.

23 A No, I don't remember seeing anything different.

24 Q So looking at 2004 amendment, and this is an
25 amendment to the 2001 amendment, right? Section 2?

1 A Right.

2 Q This is the amendment done by the homeowners
3 association, is that right?

4 A Correct.

5 Q Okay. And then what I'm reading is that it says
6 there's a clarification. And it says this paragraph shall
7 exclude the use of the following types of structures, and it
8 adds manufactured homes and modular homes. Do you see that?

9 A I do.

10 Q And then for that sentence that was -- or that was
11 fixed the year before it says now the restriction is not
12 intended to exclude homes of nontraditional building
13 materials such as adobe. And it eliminated all references
14 to the manufactured homes. Correct?

15 A Correct. Well, it says it excludes manufactured
16 homes and modular homes.

17 Q Right. So the first sentence adds the exclusion
18 of manufactured and modular homes, and the strikeout was
19 where the amendment took out any reference saying that it
20 was okay to have one of a certain age or newer. Do you see
21 that?

22 A Yes.

23 Q Okay.

24 A It's also adds site-built in there.

25 Q Correct. I'm terribly sorry. It added the phrase

1 site-built. It's underlined, but it wasn't highlighted for
2 some reason. Site-built at the top. Is that right?

3 A Yes, that's right.

4 Q In 2009 were you on the board or part of the board
5 at the time the Olsons made application for the development
6 of their property?

7 A I was.

8 Q Do you recall if the original development included
9 the construction of a 6,000 square foot workshop and a
10 future residence nearby?

11 A Correct.

12 Q I'm going to turn to Exhibit 16. And we'll go
13 through these really quickly. Would you agree that
14 Exhibit 16 and 17 -- and it might help you to look at the
15 dates that are at the bottoms of them -- were building
16 permits taken out by the Olsons for construction of the
17 6,000 square foot structure and the septic system that
18 supported it? That would be 16 and 17?

19 A Correct. Yep.

20 Q Okay. Do you recall as part of the Olsons'
21 application to the board that they had either informed the
22 board that they had the permits or that the board actually
23 saw the permits issued by Cochise County?

24 A I believe that they said that they had the
25 permits, and they were actually sent to us at a later date.

1 Q Okay. At the time of the application did you have
2 any reason to believe that they were not issued?

3 A No.

4 Q I'm going to have you turn to Exhibit 33.
5 Looking at Exhibit 33, do you recognize that?

6 A I do.

7 Q What is that?

8 A That's the architectural review request that they
9 submitted in 2009 for the outbuilding and the residence.

10 Q Okay. And it identifies, if you look at that with
11 me, it identifies house and shop. House, see attached.
12 There's no dimensions of it. And it says 60 X 100 X 14, I
13 believe, for the shop.

14 A Correct.

15 Q And then it says, um, personal residence -
16 personal use. Exterior: Stucco house - steel building
17 shop. Do you see that?

18 A Yes, I do.

19 Q The roof, materials and description: Shingle/tile
20 - house; steel - shop. Color: Cream with brown - both. Is
21 that right?

22 A Correct.

23 Q And then on the next page, when we get to the
24 HOA's portion, it's essentially approved; is that correct?
25 Where it says action taken?

1 A Correct.

2 Q It's approved.

3 A As an outbuilding and a future building; um, home,
4 I should say.

5 Q I just want to clarify, this request, this
6 Exhibit 33 as it was presented to the board, was approved?

7 A It was approved for an outbuilding.

8 Q I'm not asking what for an outbuilding. I don't
9 see outbuilding here.

10 A A stucco house.

11 Q I don't see outbuilding. Where do you see
12 outbuilding?

13 A It was, as a shop and a stucco house it was
14 approved.

15 Q Thank you. I'm just asking if it was approved as
16 it was applied for, or was there other information or other
17 documentation that was submitted that you had to approve?

18 A No.

19 Q Okay. And so the construction of the 6,000 square
20 foot building at that point alone was approved, no problem;
21 is that right?

22 A Correct.

23 Q Okay. Just for reference, do you ever look at
24 Google Earth in any of your real estate business?

25 A Yes.

1 Q If you look at the last section again, I think
2 this time it's right after tab 50.

3 A Yeah. Yes.

4 Q There's a Google Earth. Do you see that?

5 A Yes.

6 Q Okay. And I'm going to show this to the judge.

7 And maybe you can correct me if I'm wrong. This pretty
8 much, this overhead pretty much encompasses the Chula Vista
9 area; does it not?

10 A It does.

11 Q Okay. So I'm going to point to, and you correct
12 me if I'm wrong. This is the Olsons' residence where
13 they're at now; isn't that correct?

14 A That's the outbuilding, yes.

15 Q And is this your house right here?

16 A That's my house.

17 Q And who's to the west of the Olsons?

18 A That's their family.

19 Q To the south?

20 A That would be the Swansons and the Sizemores.

21 THE COURT: Point to the, the south one again for
22 me.

23 THE WITNESS: (Pointing)

24 THE COURT: Okay. And to the west you said their
25 family. Are you referring to the Olsons' family?

1 THE WITNESS: Yes. His father and aunt, I think?

2 THE COURT: Okay. Thank you.

3 BY MR. STACHEL:

4 Q In 2011 the Olsons requested of the homeowners
5 association the opportunity to reside in the 6,000 square
6 foot structure as a temporary residence. Is that correct?

7 A Correct.

8 Q And that's Exhibit 19. Is that right?

9 A Correct.

10 Q Okay. And as I searched to the next page -- and
11 this one says temporary residence. It says existing metal
12 building, existing metal building, and so forth. And then
13 on the second page, after the signature by the requester, it
14 has comments: Disapproved; and action taken: Disapproved,
15 signed by you. And it says: Date out to requester is
16 2/21/2011. Is that right?

17 A Correct.

18 Q So that was sent back to them disapproving their
19 request, is that right?

20 A Yes.

21 Q And that request was disapproved because the
22 structure itself didn't qualify as a temporary residence, is
23 that right?

24 A Partially.

25 Q Is there another reason it was disqualified?

1 A It didn't meet the CC&R requirements. The
2 building permit was in place for a single family residence,
3 so that would be a permanent residence. And as a permanent
4 residence it wouldn't qualify as a first class site-built
5 additional dwelling. And it didn't meet the county or the
6 CC&R requirement for a temporary residence. County won't
7 allow a temporary residence to be put on a lot before a
8 primary residence is in place.

9 Q Which section is that?

10 A In the county?

11 Q Yes.

12 A Off my head I can't tell you.

13 Q Did you cite it in the letter where you
14 disapproved them?

15 A I did not.

16 Q Okay. And just so I'm clear about the role of the
17 homeowners association, it's not the homeowners
18 association's role to enforce county code; is it?

19 A It is not, but we have to be in compliance.

20 Q I'm asking a simple question. I'm not trying to
21 banter with you. It's not the homeowners association's
22 responsibility to enforce county ordinances, is it?

23 A It is not.

24 Q With regard to the language at the bottom where
25 you have, you said see more notes below, it says it -- um,

1 in the county as a mobile home or trailer for specified
2 amount of time.

3 Let's go back to the CC&Rs that were approved.
4 And I believe in -- we were talking about Exhibit 7, right,
5 were latest at that time. And then there was another
6 amendment afterwards, correct? In '07?

7 A In '07, yes.

8 Q So let's get there, so that I'm not leaving the
9 judge behind. In '07 -- or pardon me, Exhibit 9 is the last
10 and final exhibit on modification of the CC&Rs that relate
11 to this matter. Is that correct?

12 A Um, that was 2007? No? 2007 would have been --
13 maybe modified it. I believe this is the 2004, correct,
14 that you're referring to?

15 Q I'm referring to Exhibit 9.

16 A Oh, sorry. I'm in the wrong section. And I
17 apologize.

18 Q That's okay.

19 A That's correct.

20 Q So when I look at what would be the recording page
21 of 16 of 18, it's Olson page 74 at the bottom, I'm looking
22 for Paragraph 8. Do you see that at the top of the page?

23 A Yes.

24 Q It says: No mobile home or trailer shall be
25 permitted on the property, except, if permitted by zoning,

1 such mobile home or trailer is used as temporary residence
2 or other during the building of a permanent home as
3 described above, no longer than 12 months from the date of
4 construction begins of said permanent home. Homeowner may
5 apply for a variance if necessary due to delays in
6 construction.

7 So my question to you is the denial in February of
8 '11 when they asked for a variance -- or pardon me -- an
9 approval as a temporary residence, it was denied because
10 this wasn't a mobile home or trailer where you could only
11 stay for 12 months. Isn't that one of the reasons?

12 A That was one of the reasons.

13 Q You also articulated that it wasn't first class
14 site-built.

15 A Correct.

16 Q So we'll come back and discuss first class
17 site-built later. But for purposes of asking for a
18 temporary residence, first class site-built isn't the
19 criteria; is it?

20 A It is not.

21 Q Okay. So in 2011 the Olsons came to the HOA,
22 stated that they still hoped to build their personal
23 residence on the site.

24 A Correct.

25 Q But requested the opportunity to live in the

1 existing 6,000 square foot structure, for any amount of
2 time, at least up to the 12-month period. The HOA said no.
3 Is that right?

4 A That's correct.

5 Q Okay. But then approximately a month, a
6 month-and-a-half later, the HOA issued a variance. Is that
7 right?

8 A Correct.

9 Q That variance is found at Exhibit 20. And the
10 variance allows the Olsons to reside in the property for
11 three years.

12 A Correct.

13 Q And at that point they have a permit from the
14 county for the conversion of the 6,000 square foot home to
15 add a residence inside. Correct?

16 A Correct.

17 Q That was also provided, I believe, to the
18 association. Let me look back here. Sorry.

19 At Exhibit 18: Do you recognize that?

20 A I do recognize it. I pulled the permit.

21 Q Okay. So you actually went and got a copy of the
22 permit that was already issued?

23 A I did indeed.

24 Q After the three years were over did you become
25 aware that the Olsons sought to stay in the home

1 permanently?

2 A I was not on the board at that time.

3 Q Okay. You said you came back on the board in '15.

4 Is that right?

5 A Correct. And at that point --

6 Q Let me just clarify when in '15. And then I know
7 what to ask you.

8 A End of May.

9 Q The end of May.

10 A So the first meeting would have been in June, I
11 believe.

12 Q Okay. All right. Well, I mean, we're okay.

13 A Right, right.

14 Q So at some point beginning in the summer of '15
15 you became aware that the Olsons, through counsel, had
16 requested that the house, as it is, where they were living,
17 that 6,000 square foot home, be approved as their permanent
18 residence. Is that right?

19 A Correct.

20 Q And at that point did the HOA make a finding of
21 any kind that the home did not qualify because it was not
22 first class site-built?

23 A They continued along with the same lines as prior
24 boards had agreed, that it was not a first class site-built
25 residence.

1 Q Okay. But no one asked for it to be declared a
2 first class site-built residence in 2011.

3 A It was an outbuilding.

4 Q Correct.

5 A With a temporary residence within it. And we did
6 not, for clarification, we did not approve the temporary
7 residence. We just allowed them to stay in the outbuilding.

8 Q Correct. What I'm suggesting to you is this. I
9 want to make sure we're clear on this.

10 A Okay.

11 Q In 2011 the Olsons did not ask you for permanent
12 residency. They asked you for a temporary residence.
13 That's the request. It says temporary residence. It was
14 denied by one of the reasons because it didn't meet the
15 criteria for Section 8 of the CC&Rs that say it has to be a
16 mobile home or a manufactured home or something?

17 A Correct.

18 Q It can only be up to 12 months.

19 A Yes.

20 Q That was part of the denial. What you're telling
21 me is that they, the board, also on top of that, made the
22 finding that the 6,000 square foot home was not first class
23 site-built.

24 A The outbuilding was definitely not a first class
25 site-built home.

1 Q Okay. All right. So after 2011 the Olsons had
2 the inside fixed up; 2000 plus square foot living area
3 inside the home, inside the building. And in 2015 requested
4 the reconsideration of the structure as a first class
5 site-built home. Correct?

6 A Correct.

7 Q Okay. And the board denied it.

8 A Correct.

9 Q Why?

10 A Because it was not a first class site-built
11 dwelling. It was an outbuilding.

12 Q Now you understand today as part of the
13 stipulation there's a stipulation that the home is
14 site-built.

15 A The outbuilding is site-built. But our
16 requirements for an outbuilding are different to our
17 requirements in the architectural review to -- for a home.
18 A home and outbuilding are different.

19 Q So in 2011 did you have architectural guidelines?

20 A Yes.

21 Q Were they recorded?

22 A No. They're part of the board policy document.

23 Q Which document is that?

24 A You don't have it.

25 Q I don't have it.

1 A Well, I don't know.

2 Q When was it passed?

3 A We, we, every time we made the change on the board
4 and we added policy, it is placed within the board policy
5 document.

6 Q Okay. When was the first time there was an
7 architectural review board created?

8 A It would have been in 2004.

9 Q Is there any documentation to that effect?

10 A No. The, what the board has is a member at large,
11 and that's a fifth board member. The member at large is the
12 architectural review person. The board is the architectural
13 review committee.

14 Q Okay. What's more strict, the CC&Rs or your
15 governing -- or your architectural review guidelines?

16 A They're both the same.

17 Q Which one governs?

18 A The CC&Rs govern.

19 Q Okay. So you identified the request that the
20 Olsons' home be deemed first class site-built. You said it
21 was not first class, not site-built, as a home. They're
22 saying -- you're saying it's not first class?

23 A It did not meet the requirements of a first class
24 site-built traditional dwelling.

25 Q You got my attention. What's the requirements?

1 A The requirements?

2 Q Uh-huh.

3 A What is first class?

4 Q Yes.

5 A You want to know what first class is?

6 Q Yes.

7 A That would be the best, the highest, the, um -- as
8 a category. And the most expensive, the nicest, the most
9 aesthetically pleasing building that you could have.

10 Q Okay.

11 A And a dwelling would be home, a house.

12 Q Oh, no, no. I'm still back at first class.

13 A Oh, you're still --

14 Q So phrases like the most expensive, the best, the
15 highest, whatever.

16 A Correct.

17 Q Okay. Who put in the phrase first class in the
18 CC&Rs?

19 A I assume it was the declarant.

20 Q Okay. So would you agree today that it's kind of
21 important what he thought it was?

22 A I imagine so, yes.

23 Q Okay. Did you consider manufactured homes to be
24 the most expensive, the highest, the best?

25 A Within the industry of manufactured homes there

1 were first class manufactured homes, second class, and third
2 class.

3 Q Okay. Well, let's look at experience. When you
4 turn off of Highway -- is it 82 or on 83?

5 A Eighty-two.

6 Q When you turn off 82 onto Chula Vista, which is
7 this street right here. This is 82. Do you see that? It
8 would be -- there you go. Sorry.

9 A Yeah. Yes.

10 Q This is 82. And Chula Vista comes in a
11 south/southwesterly direction off of that, is that right?

12 A Right.

13 Q So when you make that first turn off Chula Vista
14 and you turn heading southwest, what's the first structure?

15 A There are some manufactured homes there that came
16 in prior to the change of the wording.

17 Q Okay. So they came in prior to the 2004
18 amendment, is that right?

19 A Correct.

20 Q How many do you have?

21 A There were originally four. One burned down.
22 Because it was -- they were grandfathered in. When it
23 burned down, the requirement was that it be a first class
24 site-built dwelling put in its place. And the site-built,
25 first class site-built dwelling is now in its place.

1 Q Have you been and seen the other mobile home
2 units?

3 A I have.

4 Q Are they the most expensive? Are they the top of
5 the line?

6 A They are not.

7 Q Moving down Chula Vista, at some point you can
8 turn left again and make your way out to Mr. McRoy's, is
9 that right?

10 A On Yucca Springs, correct.

11 Q Yes. Okay. Now Mr. McRoy's house, is that a
12 mobile home?

13 A That is not.

14 Q It's not a mobile home?

15 THE COURT: And I'm sorry. I didn't get the
16 reference where we are on the map.

17 MR. STACHEL: Sorry, Judge.

18 BY MR. STACHEL:

19 Q So correct me if I'm wrong, please,
20 Ms. Cunningham. Coming southwest on Chula Vista and then
21 turning left. All right, I know the name of the street.

22 A Yucca Springs Trail.

23 Q Thank you.

24 So turning left at Yucca Springs Trail and coming
25 to the end.

1 And it would be this structure here, Judge.

2 THE COURT: Okay. Thank you.

3 BY MR. STACHEL:

4 Q Let's go to Exhibit 27 -- or pardon me -- 28. Do
5 you recognize the structure that appears in the photograph
6 on Exhibit 28? And there are two photographs.

7 A I believe that's Mr. McRoy's property.

8 Q That's Mr. McRoy's property?

9 A Maybe. It's definitely his dog.

10 Q And definitely his dog, yes, that's correct.

11 A I recognize it.

12 Q How would you characterize that construction?
13 Stucco, wood, frame, metal?

14 A That's a steel building.

15 Q Steel building. Okay. And when you go to the
16 second page it becomes a little more obvious that it's a
17 steel construction, is that correct?

18 A Correct.

19 Q Okay. Do you know when Mr. McRoy's building was
20 built?

21 A I do.

22 Q When was that?

23 A It was in 2004. He applied -- he had submitted
24 architectural review paperwork in December 2003. And it was
25 because of this one and the manufactured house's application

1 that the 2004 CC&R's amendments came into place.

2 Q I totally lost the question there. My question is
3 do you know when it was built?

4 A 2004.

5 Q Okay. And you said that he made an application
6 for architectural review?

7 A In 2003.

8 Q Do you have a copy of it?

9 A We have not.

10 Q Have you ever stated that you had a copy of it or
11 didn't have a copy of it?

12 A We did have a copy of it.

13 Q Where is it?

14 A In -- when was it? When Lewis Management was in
15 control of the homeowners association, they were given all
16 of our paperwork; and it was supposed to make copies and put
17 them on the hard drive.

18 Q In essence, it's not disclosed.

19 A We don't have it anymore. They lost the
20 paperwork.

21 Q I understand.

22 A Some of the paperwork.

23 Q So you did not disclose it to me. Correct?

24 A I did not.

25 Q Correct. Okay. So let me clarify this. Did you

1 say it was approved?

2 A It was approved.

3 Q Okay. And is that first class?

4 A It is not in my opinion.

5 Q Okay. Thank you. I think we finally hit the
6 crux; it's your opinion.

7 A Correct.

8 Q Okay. So who was on the board in 2015 who has
9 voted to say no to the conversion of the Olsons' home?

10 A Who was on the board in 2015? I was on the board.

11 Q Who else voted no?

12 A Um, gosh, who was on the board? Christopher
13 Zimmerman, I believe, was on the board. Charlotte Portouw
14 was on the board. Albert Schumeider(phonetic) was on the
15 board. Would that be five?

16 Q I think it might be four. But that's okay.

17 A Robert Guerra.

18 Q Do any of those parties live in a property in
19 Chula Vista that's on a mobile home?

20 A Would you say that again, sir?

21 Q Do any of those members of the board that voted
22 with the concept of first class, are any of those members
23 residing in a mobile home?

24 A They are not.

25 Q Are they residing in a steel structure?

1 A They are not.

2 Q Okay. Are they residing in first class private
3 dwellings?

4 A They are indeed.

5 Q Why? Why do you think their claim, that they're
6 first class?

7 A They're custom built homes.

8 Q Custom built. Is that different than any other
9 type of building?

10 A It is.

11 Q What's that?

12 A It's of a higher standard. It's aesthetically
13 pleasing. It's using superior fittings and fixtures.

14 Q Where is that in Section 2 of the protective
15 covenants?

16 A It's under the termination -- the terminology, I
17 should say, first class site-built dwelling; traditional
18 first class site-built dwelling.

19 Q Well, let's go back. You said first class
20 site-built. Is first class defined anywhere in the CC&Rs?

21 A It is not.

22 Q Okay. In fact, in the CC&Rs there is a definition
23 section; correct?

24 A Correct.

25 Q And if that wanted to be defined, it could have

1 been defined in that section; correct?

2 A It could have been.

3 Q Okay. But the developer and then subsequently the
4 HOA has chosen not to define it. Is that right?

5 A We have a problem getting anything passed.

6 Q It's an interesting point. In fact, that was one
7 of my questions. At some point since all this has come down
8 you've had opportunities to try and modify this, right?

9 A We have.

10 Q Okay. Have you successfully modified the phrase
11 first class?

12 A We have not.

13 Q Okay. But why was it important to you to do that?

14 A Because we have been sued?

15 Q No. You started the development of the idea of
16 first class, changing it and defining it, before the lawsuit
17 began. Correct?

18 A I'm trying to think.

19 Q A moment ago you said it's tough to get things
20 done.

21 A It is very tough to get things done. I'm not sure
22 at this point if we've actually tried to change that
23 terminology.

24 Q But do you recognize that, absent a true
25 definition, how hard that is to understand?

1 A No.

2 Q You don't think it's hard to understand at all?

3 A I do not.

4 Q So what has to be built in your development is the
5 most expensive home possible?

6 A No.

7 Q You said expensive is one of them.

8 A If you were to Google search first class home.

9 Q Okay.

10 A You'll have everything from a castle to custom
11 homes of different sizes, shapes, and in different places.
12 The difference between the first class and a second class
13 home is that the first class home is custom built using
14 expensive fixtures, features, and is a very aesthetically
15 pleasing to look at.

16 Q So, just so we're clear on this, the idea of what
17 first class is is your opinion.

18 A If you've ever traveled first class by airplane,
19 you will know the difference when you walk through first
20 class and head to second class.

21 Q Okay.

22 A There are differences. If you've ever been to a
23 first class hotel, or a second class hotel, or a third class
24 hotel, you would know there was a difference.

25 Q Okay. So would it have made a difference then if

1 the developer had simply said second class private dwelling?

2 A It would have.

3 Q Really. What would that encompass?

4 A That would be probably cookie cutter homes, RL
5 Workman style, everything looks alike, 2 X 4 construction.

6 Q Okay. Now I'm gathering this. So basically if I
7 hired RL Workman to build me a plan that he's got in another
8 subdivision, and I have him come out and take that floor
9 plan, and I come out to Chula Vista, I'm going to get denied
10 because it's a cookie cutter home?

11 MR. SMITH: Objection, speculation, your Honor.

12 THE WITNESS: Thank you.

13 THE COURT: Overruled. You can answer if you can.

14 THE WITNESS: RL Workman produces several types of
15 home. He produces the standard subdivision type home. He
16 also produces semi custom homes where he uses a different
17 grade of construction. He uses more superior fixtures,
18 fittings. You can change the floor plan, add things,
19 different features to it. So he, himself, knows the
20 difference between a first class and a second class home.

21 BY MR. STACHEL:

22 Q Oh. Does he advertise them that way?

23 A He advertises them as standard homes or semi
24 customized homes.

25 Q But what you're telling me though is a standard

1 home does not rise to the level of first class.

2 A It does not.

3 Q Is that what you understood Mr. Martin, the
4 developer, to mean when he said first class?

5 MR. SMITH: Objection. She doesn't know the
6 developer's intent or what he was thinking when he drafted
7 it.

8 THE COURT: Then she can say that --

9 THE WITNESS: That's what I was about to say.

10 THE COURT: -- if that's the case.

11 THE WITNESS: I have no idea. I've never met
12 Mr. Martin.

13 THE COURT: Okay.

14 BY MR. STACHEL:

15 Q But there were several homes and developments or,
16 pardon me, structures that were constructed at or near the
17 transition time that were approved by Mr. Martin or by the
18 early board of directors. Is that right?

19 A I wasn't on the board at that time.

20 Q In your understanding of the history of Chula
21 Vista, are you aware that there were mobile homes that were
22 there beforehand? And there were -- and Mr. McRoy's was
23 approved by the board early on. You weren't on that board
24 either.

25 A I was not.

1 Q Okay. But you know that they were approved,
2 correct?

3 A Some were.

4 Q Okay. So they were approved. And my question to
5 you is this. Someone had to evaluate them as first class.
6 Correct?

7 MR. SMITH: Objection, your Honor. She still
8 doesn't know what was in the mind of those people, whoever
9 they might be.

10 THE COURT: Overruled. You can answer if you can.

11 THE WITNESS: I don't know what they were thinking
12 back then. I have no idea. I wasn't around.

13 BY MR. STACHEL:

14 Q When we talk about the Olsons' home where they're
15 residing now, 6,000 square foot, steel, metal structure,
16 okay, is there something about the material that's
17 offensive?

18 A It's a very large outbuilding. It's more like a
19 commercial warehouse.

20 Q Okay. Is there something about the structure that
21 would violate the CC&Rs, something about its construction?

22 A It's constructed like a commercial warehouse.

23 Q Okay. Would that -- so I guess what I'm getting
24 at is materials. We're talking building materials now. Is
25 it the metal that's offensive?

1 A It's the structure.

2 Q Okay. I'm going to ask it another way. Does it
3 matter what the exterior construction is made of? Does that
4 matter in the analysis, in your analysis of first class?

5 A If it was aesthetically pleasing to look at, the
6 answer is no.

7 Q Okay. Aesthetically pleasing to look at?

8 A Correct.

9 Q Is that phrase in the CC&Rs?

10 A It is not.

11 Q Is it the metal, the metal roof? Does that
12 matter?

13 MR. SMITH: Your Honor, I'm going to object to the
14 line of questioning because this case is not about whether
15 or not the structure should stay. It is about whether the
16 Olsons should comply with their 2009 approval to have an
17 outbuilding and a first class site-built residence that they
18 plan to build. We are not seeking to tear this down. It
19 was, it was built as approved as an outbuilding or ancillary
20 structure. So this line of questioning isn't furthering the
21 case.

22 THE COURT: Overruled. Thank you.

23 THE WITNESS: We are -- we do allow nontraditional
24 building materials. We just don't allow nontraditional
25 dwellings. If you use nontraditional supplies, the overall

1 effect has to be aesthetically pleasing to look at and match
2 with whatever else is within the subdivision. That's all I
3 can say really.

4 BY MR. STACHEL:

5 Q Okay. It helps. So what you're saying is that it
6 doesn't matter that the material is steel or metal. You
7 just don't like the way it looks.

8 A It doesn't match the aesthetics of the
9 subdivision.

10 Q Okay. Are there any other large metal buildings
11 in the subdivision?

12 A As outbuildings, correct.

13 Q Okay. There are.

14 A There are.

15 Q And how many?

16 A Oh, one, two, three, four, five, or six.

17 Q Okay. Some of them have RVs under canopies on the
18 sides of them, is that right?

19 A Correct.

20 Q Others, some have been used as residences but
21 aren't anymore. Is that correct?

22 A I have no knowledge of that.

23 Q Okay. But these are pretty big structures as I go
24 back to the map, right? They are -- we have the Olsons'
25 here. Correct?

1 A 60 X 100, correct.

2 Q Another one here?

3 A That's a 40 X 60; 40 X 60.

4 Q Another one here?

5 A 40 X 60.

6 Q This one is actually a residence on the east side.

7 That's the McRoy house.

8 A Much smaller.

9 Q Is the -- has the makeup of the board changed over
10 the years? I mean, you've obviously been on and off of it a
11 couple of times.

12 A Every two years it changes. Well, every year
13 really because, um, board members are voted in; two one year
14 and three the next.

15 Q When you said you did research on first class,
16 what did you look up?

17 A I Google searched first class. I looked up the
18 definition in the dictionary. Um, I did research on, on
19 more basically what the definition of first class would be
20 in different industries; in the railway industry
21 historically what was the historical relevance of first
22 class, why was it ever used, when it was it used.

23 Q Did you ever call Mr. Martin?

24 A I do not know Mr. Martin.

25 Q Did you ever call him?

1 A Actually, I tried to call Mr. Martin on a
2 different issue several times; and it was rebuffed. So, no.

3 Q Okay. So you never had an opportunity to talk to
4 him about what he meant?

5 A He's rather old now apparently and not able to
6 talk to us.

7 Q Okay. Have you -- when was the last time you were
8 at the Olsons' place?

9 A The day that they signed the variance letter.

10 Q Okay. Have you -- I mean, they live behind you,
11 right? About, what? What is that distance? A quarter
12 mile?

13 A Yeah, must be.

14 Q From this point to this point? (Indicating)

15 A Yeah. There's a couple of lots between us.

16 THE COURT: So 2011, is that what you're telling
17 me? The variance letter that you referred to?

18 THE WITNESS: Yes, yes, your Honor.

19 THE COURT: Okay.

20 BY MR. STACHEL:

21 Q Do you recognize that photograph? Is that, does
22 that tell you what -- anything about this? I don't have
23 that one in here unfortunately. This is the only one I
24 don't.

25 A I've never seen it before, I don't think.

1 Q Can you recognize things, structures from that
2 photograph?

3 A Um, if I had my glasses on, I probably would. But
4 I'm assuming that that is the Olsons' outbuilding.

5 Q Right here?

6 A Yes. And then they have some grass by the looks
7 of things. And then down here is Mr. Swanson's property.

8 Q Mr. Swanson's? Okay. What is Mr. Swanson's built
9 of?

10 A It's a log cabin.

11 Q A log cabin? Okay.

12 A Correct.

13 Q Okay. And were you on the board when that was
14 deemed first class?

15 A I was not.

16 Q Okay. Do you know when it was built?

17 A I can not remember.

18 Q Sometime in the last eight years?

19 A It's a very beautiful structure.

20 Q Oh, okay. It's a log cabin?

21 A It is. A very nice log cabin.

22 Q Do you recall this structure right here?

23 A I don't have my glasses.

24 Q Sorry. Do you need your glasses?

25 MR. SMITH: Could counsel move the stand closer to

1 the witness?

2 THE COURT: We can do that. Or you can give her
3 her glasses if she's got her glasses.

4 THE WITNESS: They're not here. If my husband
5 wants to go and get them out of the car?

6 THE COURT: All right. Well, we're going to take
7 a break in a few minutes.

8 MR. STACHEL: I can wait on that, yes, Judge.

9 THE WITNESS: All right.

10 MR. STACHEL: Wait until the glasses come out.

11 THE WITNESS: Sorry. I wasn't expecting to be
12 called today.

13 BY MR. STACHEL:

14 Q Now you said that you don't have a problem with
15 the metal as a structure because, in fact, you said you
16 allow, quote/unquote, nontraditional materials. In fact,
17 throughout the development there are several homes that
18 have --

19 A Metal roofs.

20 Q -- metal roofs, as an example.

21 Okay. So the metal is not an issue.

22 If you would go to Exhibit 10 for me. This is a
23 notice of violation that appears to have been recorded
24 July 31st of '15.

25 A Correct.

1 Q Okay. Can you tell me at what meeting the HOA or
2 the board of directors approved the recording of a notice of
3 violation against the Olsons?

4 A I believe it might have been the June one.
5 However, it was, the notice of violations was put in place
6 because the lawyer suggested that we should do so.

7 Q The lawyer suggested you should put this in
8 violation?

9 A Correct.

10 Q And was this at an executive meeting, a closed
11 meeting, an open meeting? When did you discuss this?

12 A This was discussed during board business outside
13 of meetings, and ratified, I believe, probably at the June
14 meeting.

15 Q And recorded on the 31st of July, 2015?

16 A Correct.

17 Q Okay. When you look at the notice, it says that
18 structure on the following property is in violation of Chula
19 Vista CC&Rs protective covenants Paragraph 2.2.

20 What is 2.2?

21 A I would have to look at it.

22 Q I think the latest was at Exhibit 9.

23 A Nine.

24 Q But I'm confused because it talks about easements
25 at 2.2.

1 A Yes, correct. It should have been 1.2.

2 Q 1.2?

3 A Protective Covenant 2 it should have stated; not
4 2.2.

5 Q So it's a typo?

6 A Correct.

7 Q And then that was removed --

8 A Correct.

9 Q -- according to Exhibit 11. That was removed?

10 A Correct.

11 Q Why?

12 A We had been advised to put the notice of
13 violation, um, in public records so -- after we had given
14 them notice that we would do so. Looking back at the
15 paperwork, the board decided we had given them plenty of
16 notice. But once we had recorded it and discussed it with
17 the lawyers, they said we had to give them specifically a
18 10-day notice, a specific notice. So it was removed, and
19 then the lawyers prepared the letter giving them the
20 specific 10-day notice.

21 Q Okay. I'm going to refer you now to Exhibit 23.

22 Is Exhibit 23 the 10-day notice?

23 A Correct.

24 Q And if you go to the second page, what are the
25 options that they have to cure this violation?

1 A Remove the temporary residence, commence the
2 construction of a permanent residence within 10 days of this
3 letter.

4 Q Okay. Was there a response? Go to Exhibit 24.

5 A Yes.

6 Q When you have an opportunity to -- I don't know if
7 you've seen that letter before.

8 A I have.

9 Q Okay. If you go to the second sentence of the
10 last paragraph of the first page, read that sentence please.

11 A The last portion?

12 Q The second sentence of the last paragraph of the
13 first page.

14 A Please consider this letter the Olsons' demand to
15 be heard by the board in an open meeting before the
16 imposition of the fine.

17 Q Right. Was an open meeting scheduled?

18 A Correct. It was.

19 Q Okay. And an open meeting was held, correct?

20 A Correct.

21 Q In fact, it was held in October. Is that your
22 understanding?

23 A Twenty-first of October.

24 Q Okay. And it was an open meeting, correct?

25 A Correct.

1 Q If that's the case, why did the board then meet in
2 executive session to deliberate?

3 A The president addressed the meeting and explained
4 how the meeting was going to be set forward.

5 Q I'm sorry to interrupt. Which meeting?

6 A The open hearing that you were at.

7 Q Thank you.

8 A And within that he explained how it was going to
9 proceed, that the Olsons' would have their say, that there
10 could be questions asked of the president only, that if a
11 lawyer had to ask a question that he would ask a question of
12 the homeowners association lawyer, and it would be open to
13 the public. And then the board would convene to discuss the
14 situation with their lawyer. If the Olsons or their lawyer
15 had objected at that time, then we maybe would have changed
16 things.

17 Q What do you mean if the Olsons had objected at
18 that time? They requested an open meeting.

19 A They had their open meeting.

20 Q Uh-huh.

21 A They did not request at that time that we discuss
22 how we were going to proceed in front of them.

23 MR. STACHEL: Your Honor, I want to show the
24 witness the statute. But I would like to present the copy
25 to the court and opposing, if I could.

1 THE COURT: Very well.

2 BY MR. STACHEL:

3 Q And what I'm showing you is Arizona Revised
4 Statutes 33-1804. It is the section entitled open meetings
5 and exceptions. Do you see that?

6 A I do.

7 Q Okay. And it talks about when board of directors
8 or committees can go into an executive session, meaning that
9 it's closed to the members.

10 A Correct.

11 Q Okay. And there are exceptions. But I'm asking
12 you to look to, on the second page, top of the page. And
13 can you read that sentence, please.

14 A Is it five?

15 Q Number 5.

16 A Discussion of a member's appeal of any violations
17 cited or penalty imposed by the association, except on
18 request of the effective member, that the meeting be held in
19 an open session.

20 Q Okay. So you acknowledge that the Olsons, through
21 counsel, requested an open meeting to have their appeal of
22 their fine and violation be heard. In fact, you acknowledge
23 that there was an open meeting; correct?

24 A Correct.

25 Q Okay. My question is why did you go into private,

1 into closed session, if you knew it was in violation of
2 statute?

3 MR. SMITH: Objection, your Honor.

4 THE COURT: What's the objection?

5 MR. SMITH: The objection is that, um, counsel is
6 stating that it was a violation of law which isn't
7 introduced into evidence and isn't within this witness'
8 purview. That's the court's determination whether or not
9 the actions violated the law.

10 THE COURT: Restate, please.

11 BY MR. STACHEL:

12 Q As a member of the board of directors were you
13 aware of this statute regarding HOAs and your exceptions and
14 when you could go into closed session?

15 A I was.

16 Q So you were aware of all the the exceptions in
17 which the board can go into closed sessions?

18 A Correct.

19 Q Including this Number 5, is that correct?

20 A Correct.

21 Q Okay. And my question is why did you go into
22 closed session knowing it was an open meeting requirement
23 that you deliberate in open?

24 A To meet with the lawyers.

25 Q Okay. So you met with the lawyers. Let's talk

1 about that. You produced a, um, I believe there was a
2 minutes on this; is that right? Exhibit 38. Do you see
3 that?

4 A Yes.

5 Q And these are minutes that you prepared?

6 A Yes.

7 Q Okay. Basically, it's called to order at 8:18.
8 And you decided to consider the case over the next few days,
9 not make a final decision until the meeting of the 4th of
10 November. Is that right?

11 A Correct.

12 Q So then you met again on the 4th. I'm turning to
13 Exhibit 39. Now that was the board meeting that was held, a
14 normal board meeting that is open to to public; correct?

15 A Correct.

16 Q These minutes are there, but they don't talk about
17 the Olson case. Right?

18 A Correct.

19 Q And go to Exhibit 40. And those are the executive
20 board meeting minutes, held on November 4th.

21 A Correct.

22 Q Okay. Who's present?

23 A Just the board members.

24 Q Okay. No lawyer?

25 A No lawyer.

1 Q Okay. And at that meeting you discussed the Olson
2 violation; moved, seconded, and agreed to fine them a
3 hundred dollars a month at that point. Correct?

4 A We did.

5 Q You also voted not to remove the recorded notice
6 of violation. Is that right?

7 A Correct.

8 Q Okay. So the reason I'm asking you this, here we
9 are in November, after the October meeting that was held to
10 the public. In August I, as counsel for the Olsons,
11 requested this open meeting. But for some reason -- and
12 September -- see Exhibit 12.

13 A Yes.

14 Q In September of 2011, between my request and
15 between the open meeting, the association again filed a
16 notice of violation.

17 A Correct.

18 Q You recorded it.

19 A I did.

20 Q But you recorded it in the face of the request for
21 an appeal hearing.

22 A The appeal hearing was for the fine, not for
23 notice of violation.

24 Q So you didn't -- you bifurcated the two. One is
25 for the notice of the hearing -- or the notice of violation,

1 and one is for the fines?

2 A We took the lawyer's advice way back in June or
3 July when he suggested that we should record the notice of
4 violation.

5 Q But you didn't record the -- you didn't mail the
6 notice of violations on the Olsons. You didn't bother to
7 send it to their counsel.

8 A We did not.

9 Q Just recorded it.

10 A We recorded it.

11 Q Okay. And what was the purpose of recording it?

12 A To cloud the title.

13 Q Right. Very good.

14 A Which is allowed for within our governing
15 documents.

16 Q Okay. So because the governing documents say it's
17 okay to cloud the title, to make the title unmarketable --

18 MR. SMITH: Objection, your Honor. There is no
19 evidence that the title is unmarketable because of the
20 recording of a notice of violation.

21 THE COURT: Overruled. But go ahead and rephrase,
22 if you would please.

23 MR. STACHEL: Judge, I don't even think I need to.

24 BY MR. STACHEL:

25 Q You understand, as a real estate agent, the

1 concept of clouding title; right?

2 A I do indeed.

3 Q What would be the effect on the Olsons of the
4 recording of the notice of violation?

5 A They would not be able to sell the property
6 without doing something to remove that notice of violation.

7 Q Right. They couldn't cure it.

8 A They would have to cure it.

9 Q Right. But they also couldn't refinance, right?

10 A They could not. They would have to cure first.

11 Q Okay. Please look at Exhibit 12 which is the last
12 recorded notice of violation and tell me what the requirem t
13 is to cure that would be stated in the notice.

14 A It's not stated. Oh, wait. I'm looking at the
15 wrong one.

16 They had to rectify violation to the satisfaction
17 of the Chula Vista board of directors.

18 Q Very good. And what does it say in there how to
19 do that?

20 A It does not.

21 MR. STACHEL: Okay. Your Honor, I have a few more
22 questions and areas to go, but it might be a good time for a
23 break.

24 THE COURT: We'll go ahead and take the afternoon
25 recess. We'll be back in about 15 minutes.

1 (A recess is taken.)

2 THE COURT: We're back on the record, Olson versus
3 Chula Vista.

4 Mr. Stachel, please continue.

5 MR. STACHEL: Thank you, your Honor.

6

7 EXAMINATION CONTINUES

8 BY MR. STACHEL:

9 Q Ms. Cunningham, just a housekeeping thing. You
10 have your glasses?

11 A I have my glasses.

12 Q Very good. Thank you.

13 (Discussion off the record between the court and
14 staff.)

15 THE COURT: Go ahead.

16 MR. STACHEL: Thank you, Judge.

17 BY MR. STACHEL:

18 Q You provided an understanding, a detailed
19 understanding, your understanding of first class in your
20 previous testimony. Um, in the Olsons' case do you recall
21 meeting with the board to deliberate the term first class
22 with regard to the Olsons' request for, in 2015 to make
23 their home permanent?

24 A Not specifically first class, but we did look at
25 that portion of the protective covenants when we made the

1 decision.

2 Q When you articulate the understanding of first
3 class, this is what affected your vote and your
4 understanding of why you voted to deny. Is that correct?

5 A Correct.

6 Q Was that similarly expressed among the board
7 members at your meeting?

8 A Similar.

9 Q At the meeting that was held on October 21st,
10 2015, the open meeting, you had a session where you talked
11 about the minutes of who attended that meeting. And I
12 believe the first part of it was probably the board members
13 that attended. I'm going to change to the minutes here in a
14 second. Sorry.

15 I believe it was Number 30. It wasn't 38. Sorry.
16 Thirty-eight was the executive meeting.

17 I beg your pardon, Judge.

18 MR. SMITH: Twenty-five?

19 MR. STACHEL: Twenty-five. Thank you.

20 So if you would turn to 25.

21 BY MR. STACHEL:

22 Q Looking at Number 5, um, these were the people
23 that spoke at the meeting; is that right?

24 A Correct.

25 Q At the meeting do you recall if there was any

1 consensus one way or the other? And was it -- were the
2 members there in support or in opposition of the Olsons'
3 request?

4 A I don't recall.

5 Q Looking at the names, do you recall who may have
6 spoken against the Olsons' request? Item Number 5.

7 A Mr. Carlson. I don't really recall.

8 Q Did you take notes to find out which members may
9 have been in favor and not in favor?

10 A It was recorded.

11 Q Did that become part of your discussion later that
12 evening and again on November 4th?

13 A It did not.

14 MR. STACHEL: I don't have much more, Judge. Give
15 me one quick second, but I'll note that was about it.

16 BY MR. STACHEL:

17 Q You keep track of variances that are issued by the
18 board, is that correct?

19 A We do.

20 Q That's Exhibit 43, is that right?

21 A To the best of my knowledge, yes.

22 Q Okay. Your understanding, looking at Exhibit 43,
23 is that based on the lot numbers on the left, the date of
24 the variance on the right, that would give you an indication
25 that the HOA had given the variance. Is that right?

1 A Correct.

2 Q Okay. The earliest one I note is in August of
3 2003. Does that kind of refresh your memory as to when you
4 believe the HOA may have taken over?

5 A I wasn't around in 2003.

6 Q Very good. Looking at the variances that are
7 there, would you agree with me that the variances that are
8 granted are variances off very specific numbers in the
9 CC&R's; for example, set-back requirements that had specific
10 set-back numbers, height of antennas, and so forth? Do you
11 see that?

12 A I do.

13 Q So when we deal with a variance, the request on,
14 by the Olsons on 1B, the second from the bottom, that's also
15 a fixed number, right, because the temporary residence was
16 one year, and it was regranted on to three years. Is that
17 right?

18 A Can you ask me that again?

19 Q I just want to -- I'm just clarifying that Olsons
20 got a variance on a specific number. In other words, it was
21 a temporary residence and was supposed to be one year. They
22 were granted three years.

23 A Three, three years to stay in there, yeah.

24 Q Correct. Okay. The Olsons also, to clarify, the
25 Olsons never asked for a variance from the term first class;

1 did they?

2 A I don't believe so.

3 Q On -- let's see, let me find the letter. Just one
4 second, please.

5 I beg your pardon. These things are too big.

6 All right. You sent a letter to the Olsons as a
7 result of -- and this is Exhibit 26 -- as a result of the
8 executive meeting you had on the 4th. Do you see that
9 letter on Exhibit 26?

10 A I do.

11 Q Looking down at the one, two, three, fourth
12 paragraph, it says: It is our decision not to remove the
13 notice of violations of the CC&Rs on record at the Cochise
14 County Recorder's Office and to commence a monthly fine of a
15 hundred dollars starting December 1st until the violation
16 has been remedied to the satisfaction of the board. Your
17 options for remedy would be submit an architectural review
18 and commence the building of a first class primary
19 residence.

20 I just want to clarify that one right there. So
21 you're not asking that the 6,000 square foot structure be
22 removed?

23 A Absolutely not.

24 Q Okay. You're asking that they submit plans for a
25 first class -- and we've already discussed what your idea of

1 first class is. But they have to submit plans for another
2 structure. Correct?

3 A The same ones as before, hopefully.

4 Q Well, it says submit an architectural review; so
5 I'm assuming it could be anything, but it has to be
6 something new. It can't be the existing 6,000 square foot
7 structure.

8 A Absolutely.

9 Q Next is interesting. Submit an architectural
10 review to beautify the outside of the existing building to
11 be commenced immediately following board approval.

12 Here is some pictures of the Olsons' place. Let's
13 take that one. And, oh, we'll do a few more. We'll put
14 this over here. Can you see those okay?

15 A I can, even without my glasses.

16 Q All right. So obviously you were directed by the
17 board to prepare this letter to the Olsons.

18 A Right.

19 Q So in your deliberations you had an opportunity to
20 talk to the board about Number 2, what would be, you know,
21 what would, what you would do to beautify the outside of the
22 building. Correct?

23 A Correct.

24 Q Okay. So what was it? What were they supposed to
25 do?

1 A We met with the Olsons prior to the lawsuit --

2 Q Right.

3 A -- to discuss different options.

4 Q And I understand that. And I'll come back to that
5 in a moment. But as part of the board's decision on
6 November 4th, which instructed you then to write the letter
7 of November 8th, what were the options?

8 A The options were to be, Number 1, they could
9 stucco the entire structure.

10 Q Okay. Let's stop right there. So they could
11 stucco the entire structure. So --

12 A That's not the entire structure though, is it?

13 Q Oh, I understand.

14 A It's just the outside.

15 Q I can show you more pictures.

16 A It's just the south 60 feet.

17 Q I'm assuming we all know it has sides and back and
18 that kind of thing.

19 A These are images taken from maybe, what, 50 feet
20 from the property. The way Chula Vista land lies, their
21 property is sitting high up near the highway. So further
22 down into the subdivision the view that you get is of a
23 commercial size warehouse. You don't see all the fancy
24 grass. You don't see the patio there. What you see is a 60
25 X 100-foot commercial size warehouse.

1 Q Are you referring like from your house?

2 A No. Actually, luckily, because of the way my
3 house is, I have large trees in the north pasture; I don't
4 actually see that very often, and just partially.

5 MR. STACHEL: So may I approach, Judge?

6 THE COURT: Yes.

7 BY MR. STACHEL:

8 Q Just to make it easier for us to point out.

9 A Oh, I can put my glasses on.

10 Q Yes, you can. But I wanted to show it to you. So
11 looking at this, we have the Olsons' place right here?

12 A Yes.

13 Q Okay. So your place is right here?

14 A It's here.

15 Q Okay.

16 A You see all these trees? They screen it.

17 Q I do see it. Right. So the board then feels that
18 it's not a good sight if it looks commercial from where?

19 A I actually have -- well, you can't -- I can't show
20 you the pictures that I have. But I took pictures from
21 Puesta del Sol, from Chula Vista Road, from Mule Lane, from
22 El Rancho Boulevard, and also down here closer to Dust
23 Storm. It sits high. So it comes down, down, down. And
24 it's more visible further down you get than when you're
25 close up to it.

1 Q Okay.

2 A And the worst view, unfortunately, is from the Old
3 Fathers' property right here. They're trying to sell those
4 lots.

5 Q Oh, is that raw land?

6 A It is.

7 Q And have they complained?

8 A They have.

9 Q And did you have it listed?

10 A I have it listed.

11 Q Okay. So it matters to you?

12 A It matters to the Olsons' -- the Old Fathers. I
13 beg your pardon.

14 Q Sure. So look at the scale at the bottom left of
15 that. Do you see that? The bottom right, I'm sorry.

16 A Yes.

17 Q It's 3,000 feet is that distance?

18 A Yes.

19 Q So if you were to go from the Olsons to the other
20 end of Chula Vista, how far are we talking about?

21 A Well, Chula Vista Road is three-and-a-half miles.

22 Q So it's possible we're talking several miles away
23 to see this structure?

24 A Correct. It's very visible.

25 Q But you said stucco. So let's talk about that.

1 So they stucco the whole thing. That's solves the problem?

2 A No. We asked him to stucco it, to put
3 architectural detail on the corners, architectural details
4 around the windows, and also to put a, um, a porch, a
5 wrap-around porch around the portion that is the home that
6 would actually be visible. The top portion of it would be
7 visible throughout the community.

8 Q Okay. So let me talk about this just briefly. Is
9 there anything in the CC&Rs that talks about stucco?

10 A No.

11 Q How about wrap-around porches?

12 A No.

13 Q Awnings over windows?

14 A No.

15 Q So this is just the board's idea of what it
16 believes --

17 A Would make it more aesthetically pleasing.

18 Q Not aesthetically pleasing. First class. Does
19 that make it first class if they do that?

20 A It makes it more aesthetically pleasing to look
21 at.

22 Q Well, I've got to ask because you've claimed that
23 first class is the violation. It's not first class.

24 A I claim it's not a first class site-built
25 traditional dwelling.

1 Q Well, we've also already agreed it's site-built.
2 So first class private dwelling. To satisfy that, does the
3 stucco make it satisfied; and the other things you've
4 identified?

5 A Traditionally, especially in this area, buildings
6 that we live in are stucco.

7 Q Okay. The other issue is this. The Number 3
8 option: Move out of the temporary residence and have the
9 building redesignated as an outbuilding with Cochise County.

10 A Correct.

11 Q What if they moved out and asked you to designate
12 it as a guest house?

13 A (Shrugs) They would have to submit an
14 architectural review, and the board would review that.

15 Q Well, you're looking at it and seeing it. Is
16 there anything in the CC&Rs that make it a problem?

17 A It's not a traditional dwelling. It's not a first
18 class site-built traditional dwelling. And a guest house
19 would have to be, being a dwelling, it would have to meet
20 the terms of the CC&Rs, I would assume.

21 Q Okay. So it has to be first class as well then?

22 A It would have to be a first class site-built
23 traditional dwelling.

24 Q Okay.

25 A I would assume. I'm only one board member.

1 Q You are. But you're the one designated by the
2 board to represent it. And I'm asking questions about
3 specifically Paragraph 2. So Paragraph 2: No improvement
4 or structure whatsoever, comma, other than first class
5 site-built private dwelling, comma. Then it says house.
6 What's the difference?

7 A Maybe they were just trying to define dwelling. I
8 don't know.

9 Q I guess I'm asking you.

10 A I didn't write the CC&Rs.

11 Q I know. I know. Believe me. I'm asking for an
12 interpretation question. But you're interpreting that this
13 has to be a first class private dwelling. I'm asking is
14 there a difference between, in your understanding, between
15 private dwelling and house?

16 A No.

17 Q How about between patio walls and customary
18 outbuildings? Do they have to be first class?

19 A No.

20 Q They don't.

21 A No.

22 Q So what about guest houses? Do they have to be
23 first class?

24 A A guest house, in my opinion, is a dwelling; so
25 therefore it would have to be first class.

1 Q Okay. But the carports don't?

2 A It's not a dwelling.

3 Q That's the basis. It's a dwelling; it has to be
4 first class. It has to be a custom home. And that's the
5 limit. Right?

6 A In my opinion.

7 Q Okay. And I wanted to clarify, not to pick on
8 KE&G or Workman Homes, or anybody else that does tract
9 building, but your statement, just to be clear, is that
10 tract building is not acceptable as first class.

11 A Certain categories of tract building. RL Workman
12 builds more than just tract homes. It would be unfair to
13 say no to an RL Workman building if it was customized.

14 Q Customized. Does it matter what's inside?

15 A It doesn't matter to me.

16 Q No, no. Does it matter as a first class private
17 dwelling? Does it matter what's inside?

18 A It does not.

19 Q So it's only what it looks like on the outside; it
20 has to look first class?

21 A That's absolutely what is important to the
22 subdivision.

23 MR. STACHEL: No further questions, Judge.

24 THE COURT: Thank you.

25 Cross-examination? You were both wanting to

1 cross, I assume? Or are you going to designate one?

2 MR. SMITH: Your Honor, if you could, our
3 preference is not to cross-examine our own witness but to
4 call her in our case on the counterclaim and the defense at
5 a separate time.

6 THE COURT: Sure. If you want to recall her at a
7 later time and no questions now, that would be fine.

8 MR. SMITH: Yes, your Honor, that's our
9 preference.

10 THE COURT: All right. You may step down.

11 MR. STACHEL: Your Honor, plaintiff will call
12 Mr. McRoy. I believe he's outside.

13 (Witness summoned.)

14 THE COURT: Sir, you've been previously sworn. If
15 you'll come forward, as shown by the bailiff, and take your
16 seat.

17 THE WITNESS: Right there?

18 THE BAILIFF: Right here.

19 THE WITNESS: Sit down here?

20 THE COURT: You can adjust that microphone and
21 speak directly into the mic.

22 THE WITNESS: Hello.

23 THE COURT: That will be fine. Thank you, sir.
24 Go ahead.

25

1 JAMES MCROY

2 called as a witness herein, being first duly sworn, is
3 examined and testifies as follows:

4

5 EXAMINATION

6 BY MR. STACHEL:

7 Q Please state your name for the record.

8 A James Randolph McRoy.

9 Q Do you go by Randy?

10 A And I go by Randy.

11 Q Mr. McRoy, what is your trade and business?

12 A I'm the owner and operator of Whetstone Heating
13 and Cooling.

14 Q Okay. And at some point in time did you come to
15 learn of a subdivision named Chula Vista?

16 A I did.

17 Q When was that?

18 A I believe in about 2002/2003.

19 Q How did you come to find it?

20 A A friend of mine, Dale Dickmore, who owns
21 Whetstone Construction, knew I was wanting to move out of
22 Phoenix. He said come down here and look around.

23 Q Okay. And did you look at other property?

24 A I did. I looked at several properties.

25 Q What made you choose a lot at Chula Vista?

1 A Well, he saved it for the last; and he told me
2 you're going to the best last. And the minute I saw it I
3 just fell in love with the place.

4 Q How would you describe the area?

5 A What was that?

6 Q How would you describe the area?

7 A I just thought it was real open and beautiful and
8 near all the highways where I could get around a lot to go
9 where I wanted to go.

10 Q How about from a development standpoint? How
11 would you describe it? Urban? Rural?

12 A Rural.

13 Q How big are the lots?

14 A Nine acres.

15 Q And you bought a nine-acre lot?

16 A I did.

17 Q Did you have an idea of what you wanted to build
18 there?

19 A Yes, I did. A friend of mine had built a building
20 similar to mine in Chandler before I came down to Whetstone,
21 or Huachuca City. And I kind of had my mind on either
22 building a small metal building or a bigger metal building
23 with a house inside.

24 Q What did you decide?

25 A A bigger metal building with a real nice house

1 inside.

2 Q I'm going to show you an exhibit in front you.

3 It's a book. If you can turn to Exhibit Number 29. Pardon

4 me. I beg your pardon. Twenty-eight. I went one too far.

5 A Twenty-eight.

6 Q Sir, that's my fault. Sorry. My mistake.

7 A Okay. I see it.

8 Q Okay. The question has been today who is the dog?

9 A Two pictures?

10 Q Yeah, is one of them your dog?

11 A Well, that's my son's dog.

12 Q Okay. Is that your house?

13 A It is my house.

14 Q Can you describe your house? What's the square
15 footage?

16 A Total square footage is 4,000 square feet. And
17 the total living square footage for the two story house
18 inside is 1100 square feet.

19 Q Okay. And when did you decide to build it?

20 A Um, I think about 2002. I had had enough of
21 Phoenix and decided to come down. And I don't recall
22 exactly when I bought the land, but it was, it was like
23 maybe late 2002 or early 2003.

24 Q Okay. And you mentioned that you were thinking
25 about the metal building as a style. What was it that

1 convinced you that was the style that you wanted?

2 A Well, when my friend built his, I just thought
3 about it, that it's, basically there's a lot of advantages
4 of it to me. And one of them is it's fireproof,
5 termite-proof. The paint on my building is guaranteed for
6 50 years. I was able to insulate the metal building. And
7 then also, then I built a house inside that was insulated
8 again. So I have like 14 inches of insulation. So it's
9 very, very, very good on heating and cooling.

10 Q Energy efficient?

11 A Very energy efficient.

12 Q Okay. When you, um, moved into the area did you
13 notice that there were mobile homes there?

14 A I don't recall if I noticed, but -- and I don't
15 recall when they were moved in. But right about the time I
16 was building somebody did move some in on the, I think on
17 the north end.

18 Q Okay. To the best of your memory has anyone from
19 the Chula Vista Homeowners Association ever told you that
20 your structure was disapproved?

21 A Never. I don't remember anything about like that.

22 Q Okay. Let's --

23 May I approach, Judge?

24 THE COURT: Yes.

25

1 BY MR. STACHEL:

2 Q I'm going to show you this Google Earth
3 photograph. I'll turn a little bit. From that side can you
4 locate your property?

5 A Yes, I can.

6 Q Can you put your finger on it and let the judge
7 see where it is?

8 A Right there.

9 THE COURT: All right. Thank you.

10 BY MR. STACHEL:

11 Q And so you would come in off 82, down Chula Vista,
12 turn left on -- is that Yucca Springs?

13 A Yucca Springs Trail.

14 Q Go to the end of that, and then that's your house?

15 A That is my house at the dead end.

16 Q So when you're looking at the photograph in
17 Exhibit 28, okay, the first photograph that shows a porch,
18 what is it -- what angle am I looking at? Looking north,
19 south, east, or west?

20 A You're looking east from the west. In other
21 words, this faces basically west.

22 Q So from the picture here the photograph would be
23 facing -- is taken from like the Chula Vista angle?

24 A Correct.

25 Q And the next picture?

1 A This is looking from the north. This is facing
2 north.

3 Q Okay. And that's --

4 A And it's a little off. It's not quite a true
5 north. But pretty close.

6 Q Okay. Do you recall where you thought you saw
7 there were mobile homes in other areas?

8 A Yes, I do.

9 Q Can you point to them?

10 A In this area here. (Indicating)

11 Q Just off of Chula Vista Road to the left?

12 A Uh-huh. I don't even know if the other roads were
13 named at that time.

14 Q Did you obtain a building permit for construction?

15 A I did.

16 Q Would you turn to Number 29 now?

17 A Okay.

18 Q And is this your building permit?

19 A This is the building permit I obtained before we
20 started building.

21 Q Okay. So let's look at the date on it. What was
22 the date of the permit?

23 It's usually on the bottom left or bottom right.

24 A 11/26/03.

25 Q Is that your signature?

1 A Yes, it is, on the bottom left.

2 Q What is it on the bottom right?

3 A Looks like that is the permit coordinator. I
4 don't know who that is.

5 Q And date?

6 A Date for her was 12/1/03.

7 Q So that would be the date that your permit was
8 approved, correct?

9 A Correct.

10 Q Okay. Do you recall, were you either started
11 construction or beginning to start construction around that
12 time?

13 A No. We actually were breaking ground, which you
14 don't have to have a permit at that time. And I recall
15 because it was on Halloween evening, that afternoon, in
16 2003.

17 Q So 10/31 of '03 is when you broke ground?

18 A Broke ground. Just kind of pushing some trees
19 around figuring out where we were going to put the building,
20 yeah.

21 Q And then in December 1st you started the
22 construction?

23 A Apparently so.

24 Q Do you recall how long it took?

25 A I believe I finished the house in one year, so

1 that would be about December of '04.

2 Q Okay. And you moved in?

3 A And I didn't move in until, until May of '05.

4 Q Okay. Have you received any complaints of any
5 kind from the HOA regarding the construction?

6 A Not from the HOA. But I recall I went to a couple
7 of the early meetings, um, of the homeowners association.
8 And I remember a couple of comments from people in the crowd
9 as to --

10 Q Well, that's okay. It's hearsay. I don't really
11 want to go there.

12 A Okay.

13 Q Let me ask you this. You know Earl McCabe?

14 A I do know Earl.

15 Q How do you know him?

16 A He was my neighbor to the south of me when I built
17 my place.

18 Q Okay. Do you know if he was involved in the
19 transaction?

20 A I think he was involved in it somehow, as far as I
21 think he set up some of the places to sell. Whether he was
22 the realtor I bought from, I don't recall. I don't
23 remember.

24 Q Okay.

25 Approach again, Judge?

1 THE COURT: Yes.

2 BY MR. STACHEL:

3 Q Where is Mr. McCabe's property in reference to
4 your property?

5 A Right here.

6 Q Okay. He's adjacent, has the closest residence?

7 A Yes, to the south.

8 MR. STACHEL: Okay. I have no further questions,
9 Judge.

10 THE COURT: Thank you.

11 Cross-examination?

12 (Discussion off the record between counsel.)

13 MR. TENNESON: Just a few quick questions, your
14 Honor.

15 THE COURT: Sure.

16 THE WITNESS: Am I talking too loud? I'm trying
17 not to.

18

19 EXAMINATION

20 BY MR. TENNESON:

21 Q Mr. McRoy, when you submit for your property that
22 you construct in Chula Vista, do you know who approves that
23 application?

24 A You mean for the building permit?

25 Q Did you have an arc request for the association?

1 A I never received one.

2 Q So you never received any approval for that
3 property?

4 A I never received a request for, from the
5 homeowners association, about what I was building or
6 anything.

7 Q You stated earlier that you had been to a couple
8 of board meetings, and the board's never directly complained
9 to you about the property; but you have heard complaints
10 from other owners. What kind of complaints have you heard?

11 MR. STACHEL: Objection, calls for hearsay.

12 THE COURT: Sustained.

13 MR. TENNESON: Your Honor, Mr. McRoy has heard the
14 complaints about his property first-hand.

15 THE WITNESS: Just one, and it was silly.

16 THE COURT: It still doesn't change it from
17 hearsay even though he's heard it. It's being offered for
18 the truth of the matter asserted, I assume, not for other
19 purposes.

20 MR. TENNESON: Okay. No, further questions, your
21 Honor.

22 THE COURT: I do have a question though. Did you
23 ever file an application, an architectural approval
24 application with the HOA?

25 THE WITNESS: No, I did not. And I was never

1 approached or asked to do so.

2 THE COURT: Go ahead.

3 MR. TENNESON: No further questions, your Honor.

4 THE COURT: Can you see the Olsons' place from
5 your house?

6 THE WITNESS: Um, I don't think so unless I'm on
7 the roof.

8 THE COURT: It's too far, or is there elevation
9 change that makes it, um, obscure it?

10 THE WITNESS: Probably just elevation change and
11 all the mesquite trees.

12 THE COURT: Okay. So if I asked you what it
13 looked like from your house, would you say I don't know
14 because I can't see it?

15 THE WITNESS: I've been there. I know what it
16 looks like.

17 THE COURT: Okay. But from your house you really
18 can't view it?

19 THE WITNESS: No, sir, I can't.

20 THE COURT: And if I asked you your opinion of
21 what it looks like, um, since you've been there, what would
22 you -- how would you describe their house?

23 THE WITNESS: I think it's beautiful and very,
24 very well made and will last a long time and nice place.

25 THE COURT: You're probably somewhat prejudiced

1 because it was kind of modeled, I guess, in some ways after
2 yours; a metal building with a residence inside.

3 THE WITNESS: I just think it's a great idea.

4 THE COURT: All right. Before we go to redirect,
5 because of my questions I'll give defense an opportunity to
6 ask any further questions based on mine.

7 MR. TENNESON: No further questions, your Honor.

8 THE COURT: Okay. Redirect?

9 MR. STACHEL: Just briefly.

10

11 EXAMINATION

12 BY MR. STACHEL:

13 Q Mr. McRoy, you've been to the Olson house.

14 A Yes, I have.

15 Q Okay. You've been to their patio; you've seen the
16 exterior of their home up close?

17 A Yes, sir.

18 Q Is there anything that you would believe about the
19 house not to be first class within the meaning of what you
20 understand the CC&Rs to be?

21 A I think it is first class. I'm not sure what you
22 said. But to me it's first class.

23 MR. STACHEL: Thank you. I have no further
24 questions, Judge.

25 THE COURT: Thank you.

1 May the witness be excused?

2 MR. STACHEL: Yes, Judge.

3 MR. TENNESON: Yes, your Honor.

4 THE COURT: No objection?

5 MR. SMITH: No.

6 THE COURT: You're excused from the rule, which
7 will allow you to stay if you want to, or leave.

8 THE WITNESS: I'll stay a while.

9 THE COURT: Okay. Your choice.

10 THE WITNESS: Thank you.

11 THE COURT: Next witness.

12 MR. STACHEL: Your Honor, call Rod Olson.

13

14

15 RODNEY OLSON

16 called as a witness herein, being previously duly sworn, is
17 examined and testifies as follows:

18

19 EXAMINATION

20 BY MR. TENNESON:

21 Q Please state your name for the record.

22 A Rodney Olson.

23 Q Mr. Olson, you're the plaintiff in this case with
24 your wife, Gloria. Is that right?

25 A Correct.

1 Q You acquired a property in Chula Vista. How would
2 you describe Chula Vista?

3 A Rural area, open, not too many close neighbors.

4 Q Okay. Is there livestock allowed?

5 A Yes.

6 Q What kind?

7 A From what I know, all kinds; horses, cows,
8 chickens.

9 Q Okay. Minimum lot size?

10 A Nine acres.

11 Q Okay. When you bought out there, how many did you
12 buy?

13 A We bought two, so we bought 18 acres.

14 Q At some point did you sell off one of the nine?

15 A Yes, we did.

16 Q Okay. And, in fact, your father lives to the west
17 of you. Correct?

18 A Correct.

19 Q Chicken and egg question; who came first, him or
20 you, as far as moving out there?

21 A He was first.

22 Q Okay. What made you choose to buy there?

23 A Um, a couple of things. I mean, I -- the area was
24 beautiful, overlooking the city, and then being close to my
25 dad.

1 Q Okay. If you can, describe for the court the
2 types of construction that you see if you're driving through
3 Chula Vista.

4 A There's all kinds. Um, anywhere from log cabin to
5 metal to stucco to just wood barns; you name it.

6 Q Metal structures?

7 A Yes, lots of them.

8 Q Well, you just heard from Mr. McRoy; there's one.

9 A Yes.

10 Q Okay. Other people use metal structures for
11 garages perhaps?

12 A Yes.

13 Q Okay. Sheds? Work buildings?

14 A Yes.

15 Q You see metal on structures for roofs, correct?

16 A Correct, absolutely.

17 Q Okay. When you moved there and you acquired the
18 property, did anybody provide you any list of acceptable
19 construction styles or techniques --

20 A No.

21 Q -- for your home?

22 Did you know about the HOA?

23 A Yes.

24 Q Did you read the CC&Rs?

25 A Yes.

1 Q Was there anything in the CC&Rs that you read that
2 in your mind and understanding barred the construction of a
3 metal building?

4 A Absolutely not.

5 Q In 2009 did you decide to --

6 THE COURT: Well, let me just clarify that. Bar
7 construction of a metal building for residential purposes.
8 Do you see the qualifier I added onto that? Not a metal
9 barn. Not a metal garage. But anything you knew from the
10 CC&Rs that would prohibit you from constructing a metal
11 residence?

12 THE WITNESS: No.

13 THE COURT: All right. Thank you.

14 BY MR. STACHEL:

15 Q Now you know the CC&Rs did bar two types of
16 construction. You know that, right?

17 A Yes.

18 Q From Section 2, the original developer, he didn't
19 want A-frames; and he didn't want geodesic dome homes?

20 A Correct.

21 Q Do you know what A-frames look like?

22 A Yes, I do.

23 Q Don't say A.

24 Geodesic domes, you know what those look like?

25 A Yes, I do.

1 MR. STACHEL: And I just want to clarify for the
2 record, Judge, Exhibit 8 is the Olsons' warranty deed that
3 they acquired.

4 THE COURT: Exhibit 8?

5 MR. STACHEL: Yes.

6 THE COURT: Okay.

7 BY MR. STACHEL:

8 Q You submitted an application in 2009 to the HOA
9 for the development of your property, correct?

10 A Yes.

11 Q Okay. It was to be a 6,000 square foot metal
12 building and another structure as a primary residence built
13 later, is that right?

14 A Correct.

15 Q Okay. And you obtained the building permits for
16 that, is that right?

17 A Yes, I did.

18 Q And that was --

19 THE COURT: Remind me again, what was the
20 application exhibit?

21 MR. STACHEL: Sorry, Judge. The application was
22 provided and for the original construction --

23 THE COURT: Yes.

24 MR. STACHEL: One moment, please.

25 Exhibit 33.

1 THE COURT: Thank you.

2 BY MR. STACHEL:

3 Q If you'll turn to Exhibit 33, and we'll go through
4 it real quick.

5 If you look at the fourth page of Exhibit 33, it
6 looks like it has some views of the house. Is that right?

7 A Correct.

8 Q And in conjunction with the metal structure, is
9 that right?

10 A Correct.

11 Q In 2011 you went back to the HOA. At this point
12 you had constructed the 6,000 square foot structure, and you
13 had installed the septic system. Is that right?

14 A Correct.

15 Q And in February of 2011 you asked the HOA for
16 permission to reside in the building temporarily.

17 A Yes, I did.

18 Q Okay. Why?

19 A Because we didn't have the money to build another
20 house.

21 Q And initially the board declined.

22 A Correct.

23 Q Right?

24 They disapproved your request, but then almost
25 immediately, I guess within a few weeks or so, the board

1 gave you a variance for three years' occupancy in the 6,000
2 square foot structure. Is that right?

3 A Yes.

4 Q At that time that they gave you the variance, did
5 you intend to still build another residence?

6 A Yes, I did.

7 Q Okay. Mr. Olson, what do you do for a living?

8 A General contractor. And I own a business, graphic
9 business.

10 Q You have a graphic arts business, that kind of
11 thing?

12 A Yes.

13 Q In Sierra Vista?

14 A Correct.

15 Q What happened in 2012 after you had moved into the
16 temporary structure?

17 A Our business did a -- the unit next to us burnt,
18 and the smoke and everything came in and basically ruined
19 everything.

20 Q So is it safe to say that you had an economic
21 down-turn?

22 A Yes.

23 Q In 2014 were you suffering from back issues?

24 A Yes.

25 Q Okay. At some point after the expiration of the

1 variance did you decide whether you wanted to stay in the
2 temporary residence permanently?

3 A Yes.

4 Q At that point had you fully constructed the
5 interior residence?

6 A Yes.

7 Q Okay. And I'm showing you a photograph now. Now
8 when did you take that picture?

9 A That one, probably a couple of weeks ago. I've
10 taken a lot of them, that same shot, so I don't know.

11 Q Okay. But at this point what I'm getting at is
12 you've created this as your residence, is that correct?

13 A Correct.

14 Q And you got a patio on the back?

15 A Yes.

16 Q We definitely call it the door to nowhere at the
17 top?

18 A Correct.

19 Q But you've got wrought iron on it?

20 A Yes, for safety, so nobody walks out.

21 Q Do you have further plans with the house?

22 A Yes.

23 Q What is that?

24 A I'd like to put a deck on there.

25 Q Okay. But this is your permanent residence.

1 Describe the inside.

2 A Tile, um, all through. It's got ceramic -- or
3 granite countertops, upgraded cabinets, upgraded faucets.
4 Um, special inlay in the showers. Insulation that's, like
5 Randy said, about 14 inches. Um, we haven't turned the
6 heater on yet since we have owned the house.

7 Q At some point with your financial situation did
8 you have to decide whether you might have to refinance the
9 house?

10 A Yes, I did.

11 Q So all along as you've been building the house
12 have you been paying as you go?

13 A Yes.

14 Q Okay. So it was free and clear?

15 A Yes, it was.

16 Q Okay. In 2014 did you obtain an appraisal for
17 refinance?

18 A Yes, I did.

19 Q It's Exhibit 27, Judge.

20 I'll have you turn to Exhibit 27. And if you'll
21 go to page one. Go to the bottom of the first page.
22 There's a question. Do you see the question? Does the
23 property generally. Do you see that on the bottom of page
24 one?

25 A Oh, the first. Yes.

1 Q Read that to the court.

2 A Does the property generally conform to the
3 neighborhood; functionality, utility, style, condition, use,
4 construction, et cetera. And it's marked yes --

5 Q Okay.

6 A -- the property generally conforms to the
7 neighborhood.

8 MR. SMITH: Your Honor, I'm going to object after
9 the fact, but for the record that's hearsay testimony about
10 the condition of the house with respect to the neighborhood.
11 We do not have the ability to cross-examine the appraisers
12 that checked that box.

13 THE COURT: Overruled. You've stipulated to the
14 exhibit being marked in, which means it comes in in its full
15 entirety. And you certainly did have the opportunity to
16 call the appraiser and make arrangements for him to be here.
17 So overruled.

18 Go ahead.

19 MR. STACHEL: One second please, Judge. I'm
20 looking at my notes.

21 THE COURT: And when was this appraisal done, sir?
22 Do you know?

23 MR. STACHEL: I believe it might be on the first
24 page, Judge, the very first page, as of in the middle of the
25 page.

1 THE WITNESS: 8/6 of 2014.

2 THE COURT: Okay. Thank you.

3 BY MR. STACHEL:

4 Q Can I have you turn to page three, if you would.
5 It's for purposes of the appraisal. Top of page three, the
6 third paragraph, it says: The appraisal was completed for
7 refinance. One below that: The highest and best use.

8 Do you see that?

9 A Yes.

10 Q Read that sentence.

11 A The highest and best use for the subject property
12 is its present improved state.

13 Q And at the time it was being appraised you were
14 occupying a certain square footage of that property and
15 using the rest of the property for storage, workshop, and so
16 forth?

17 A Correct.

18 Q Explain to the court what you use the rest of the
19 unit for.

20 A A lot of different things. We like to build
21 stuff. My wife does jewelry. Um, I have a music area. Et
22 cetera.

23 Q All right. And what's the square footage of the
24 improved structure?

25 A Of the?

1 Q Of the -- where you live.

2 A Right at 2,000 square feet.

3 Q And the property appraised a little over, well,
4 near 300,000; is that right?

5 A Correct.

6 Q When you got the refinance proceeds, were you then
7 able to use that money to build another house?

8 A No.

9 Q Why?

10 A Because we had to use it to keep our business
11 going.

12 Q As a result of the fire?

13 A Correct.

14 Q Okay. When you made your original application in
15 2009, this was the application for the approval by the
16 board, right, in 2009, you had an intention to build two
17 structures, one at a time. Is that right?

18 A Correct.

19 Q That was still your intention in 2011?

20 A Correct.

21 Q Okay. Did you sign any agreements or enter into
22 any contracts that you would build two structures?

23 A No.

24 Q How long did it take you to construct the home?

25 I'm sorry. Let's start in '09. How long did it take you to

1 construct this 2,000 square foot structure?

2 A Less than a year.

3 Q And when you started the conversion in 2011, how
4 long did that take?

5 A I want to say a little over a year.

6 Q Okay. And other than what you discussed today
7 with plans for the future, the home is completed?

8 A Absolutely.

9 Q Were you ever provided a copy of the notice of
10 violation, the recorded notice of violation from the HOA?

11 A No.

12 Q There were two. One was in July of 2015, and
13 another was in September of 2015. Did you ever receive
14 copies of them?

15 A No.

16 Q Was it only until after the denial letter from the
17 board in November of '8 that you learned of the recording of
18 the September?

19 A Correct.

20 MR. STACHEL: Judge, give me one quick second, and
21 I'll verify that I covered the table of contents.

22 Your Honor, I have no further questions.

23 THE COURT: Cross-examination?

24

25

1 EXAMINATION

2 BY MR. SMITH:

3 Q Mr. Olson, you were describing the character of
4 the neighborhood. I believe you described it as rural. Is
5 that correct?

6 A Correct.

7 Q Um, do you believe that commercial buildings are
8 rural in character?

9 A No.

10 Q How old are you, Mr. Olson?

11 A Fifty-eight.

12 Q And where have you lived in your life?

13 A North Dakota mostly and here.

14 Q Where in North Dakota?

15 A Out in the farmland.

16 Q Have you traveled much?

17 A Nope. No. I'm sorry.

18 Q It's fair to say you've seen a number of people's
19 homes in your 58 years though, is that correct?

20 A Yes.

21 Q How many homes do you think you've seen in your
22 life? Thousands? Hundreds of thousands?

23 A Yes.

24 Q How many of those are built of a steel
25 construction like a warehouse, like what you currently

1 reside in, as depicted on these photographs?

2 A Lately a lot, quite a few.

3 Q A lot?

4 A Quite a few, yes.

5 Q Can you quantify that for me? What's quite a few?

6 A I mean, just from what I've seen just recently, I
7 mean, noticing it, 20, 30.

8 Q Twenty or 30 homes you've seen recently, the last
9 couple of years?

10 A Uh-huh, right.

11 Q And help me. Besides Mr. McRoy's house, what
12 other houses have you seen?

13 A Um, there's some in Sonoita. There's some in
14 North Dakota. There's -- um, I've seen one out in the
15 Hereford area. Um, just in this area.

16 Q When you say you've seen them, how do you know
17 that they're residences?

18 A Talking to the people.

19 Q So you've talked to 20 or 30 people out and about?

20 A I didn't say that.

21 Q Well, explain to me how you know they're
22 residences.

23 A I said the people here that I've seen.

24 THE COURT: Hold up, sir. We can't have you
25 interrupting his questioning. We need you to listen to his

1 question. At some point he'll stop talking because he's
2 finished his question. And then you start.

3 THE WITNESS: Okay.

4 THE COURT: All right. Let's do it that way. Go
5 ahead.

6 BY MR. SMITH:

7 Q I believe my question is how did you know that
8 there were residences inside of the steel buildings that you
9 saw?

10 A After talking to the owners.

11 Q And you've, you've spoken with 20 or 30 owners of
12 similar steel buildings as yours?

13 A No.

14 Q They're steel buildings though, correct?

15 A Correct.

16 Q Are they -- how are they similar to yours besides
17 being made of steel?

18 A With the additional windows and, you know, walk-in
19 doors, and patio doors, things like that that wouldn't
20 normally be on a commercial building.

21 Q How did you come to speak to 20 or 30 owners of
22 those buildings?

23 A I didn't.

24 Q Who did you speak to?

25 A I said I talked to some in the recent -- in the,

1 like the Hereford area, the Sonoita area.

2 Q Who? I need to know who you spoke to that's
3 telling you about all of these residences, this boom in
4 living in warehouses converted to homes.

5 A I haven't talked to -- I mean, the ones that I've
6 talked to are where we've stopped. I didn't get names. I'm
7 sorry.

8 Q Any -- can you recall any time that you've stopped
9 and had a conversation with someone about their similar
10 living arrangement to yours?

11 A Yes.

12 Q Tell me about it, please.

13 A Mark Marcy, North Dakota, loves it. Built a,
14 almost an exact same thing that I have.

15 Q And does he live in a subdivision?

16 A Well, there's houses around him, yes.

17 Q Does he have deed restrictions like Chula Vista?

18 A That I don't know.

19 Q You didn't ask him about that?

20 A No, I did not.

21 Q Were you embroiled in this dispute with the HOA at
22 the time that you spoke with this gentleman?

23 A Yes, I was.

24 Q But you didn't ask him whether he was having a
25 fight with his HOA?

1 A No, I didn't.

2 Q He didn't bring it up either?

3 A Nope.

4 Q So still, at best, you said maybe 20 or 30 homes
5 like this out of thousands that you've seen. You're talking
6 about a fraction of one percent of homes that are like this.
7 Correct?

8 A Right. The smart ones.

9 Q That wouldn't exactly be main stream. It would be
10 reserved for the special people like yourself. Correct?

11 A I don't know how you consider me special.

12 Q Well, you said the smart ones that live in these
13 houses like yours. It's unique?

14 A With, with -- because of the termite and the no
15 maintenance and the no painting, the fire savings on
16 insurance, yes, I would say that that's smart.

17 Q A concrete bunker would serve the same purpose as
18 you just itemized, right?

19 A Correct.

20 Q You said you read the CC&Rs before you moved in.
21 And your attorney had asked you if you saw anything in there
22 that prohibited your type of housing. Do you see anything
23 in the CC&Rs that actually permit a steel constructed
24 residence?

25 A No.

1 Q When did you plan to build the separate residence
2 when you first applied in 2009?

3 A When we had the money.

4 Q And when did you make up your mind that you were
5 going to permanently reside in the steel structure?

6 A Oh, it was after all the fire and everything else
7 when we were looking at, you know, cost and had to
8 refinance. And we looked at the house and said it's, it's a
9 great house, why would we even want to move.

10 Q You testified --

11 THE COURT: I'm sorry. Tell me what year that was
12 again that this decision is to stay in the house as your
13 permanent residence.

14 THE WITNESS: Well, I don't know the exact date.
15 But --

16 THE COURT: Well, you know when your business was
17 destroyed by fire.

18 THE WITNESS: It was May of 2012, Judge.

19 THE COURT: Okay. So in relation to that, when
20 did you make this final decision that you're not going to
21 build a separate residence?

22 THE WITNESS: It was right around that time, just
23 because the way everything was going down as far as money
24 and economy and everything else.

25 THE COURT: Go ahead.

1 BY MR. SMITH:

2 Q Your business suffered losses in 2012 from a fire
3 in a neighboring property. Was there any insurance from
4 your business or from the neighboring property owner to
5 reimburse you for those losses?

6 A Yes, for some of them, a portion.

7 Q How much did you recover?

8 A We lost about 200,000.

9 Q And how much did you recover?

10 A Probably 400,000.

11 Q And how much of that was from your insurance
12 company versus --

13 A It was all ours.

14 Q It was all yours?

15 A Correct.

16 Q They wrote you a check for 400,000?

17 A No. It was in stages.

18 Q Over what period of time?

19 A Three years.

20 Q And how certain are you that it's about 400,000?

21 A Real, real close.

22 Q And you used all that money to rebuild your
23 business?

24 A Yeah, buy new equipment, buy new supplies.

25 Q How is your business doing these days?

1 A Not good.

2 Q How much did you invest in constructing the
3 residence inside this steel structure? You said you had
4 upgraded cabinets?

5 A Correct.

6 Q Upgraded faucets, inlays in the showers, 14-inch
7 insulation, granite counters, ceramic tile. Sounds like a
8 pretty, pretty nice house. Correct?

9 A It is.

10 Q How much did you spend on it?

11 A I don't remember what we -- we looked at it.
12 75,000?

13 Q Is that, is that just a guess?

14 A Yes. I don't have the numbers in front of me.
15 Sorry.

16 Q And where did the money come from to pay for those
17 upgrades?

18 A We done that as we had it, little by little. Most
19 of it was because it was, we done it ourselves, so we saved
20 some money there.

21 Q Have you ever submitted an application to finish
22 construction of a home?

23 A Yes, I have.

24 Q On this property?

25 A On this property? No.

1 Q Why not?

2 A Because I wouldn't have qualified.

3 Q How do you know?

4 A I don't.

5 Q Is it possible you just don't want to build
6 another residence on the lot?

7 MR. STACHEL: Objection, relevance.

8 THE COURT: Overruled.

9 THE WITNESS: At this point, at this point, no, I
10 don't want to build another one.

11 BY MR. SMITH:

12 Q You do understand that in 2009 you asked the
13 corporation to approve construction of a warehouse and a
14 residence. Correct?

15 A Correct.

16 Q How is that not an agreement or contract with
17 Chula Vista about what you're going to do?

18 MR. STACHEL: Objection, calls for a legal
19 conclusion.

20 MR. SMITH: Your Honor, in fact, he testified he
21 was asked about it.

22 THE COURT: Overrule the objection. Thank you,
23 Counsel.

24 You can answer.

25 THE WITNESS: The question again? I'm sorry.

1 BY MR. SMITH:

2 Q The question is when you asked the association in
3 2009 to build a warehouse and the residence, how is that not
4 an agreement or contract that you entered into with Chula
5 Vista?

6 A I said it was an intention. We had full
7 intention.

8 Q You signed the document, didn't you?

9 A Yeah, after they -- that was the only way I could
10 keep building.

11 Q It was your word that you were going to build a
12 house, correct?

13 A It was my intention.

14 Q Which is your word, isn't it?

15 A Well, it was my intention, depending on if I was
16 ever going to be able to.

17 Q Well, that's what every contract or agreement is;
18 it's something you're going to do. That's part of the
19 agreement, correct?

20 A It was my intention.

21 Q Right.

22 A I even told them in the meeting.

23 Q What meeting?

24 A When we went to the board meeting asking for the
25 variance. We said we had no idea how long it would take.

1 Q Why did you give up on the dream of building a
2 separate house?

3 A Because I spent all my money on my business.

4 Q So you can't follow through with your intention
5 and agreement with Chula Vista to do that?

6 A I don't want to because I like my house.

7 Q But that's really what it's about, you like your
8 house, not you want to comply with the agreement you struck
9 in 2009 and 2011 when you restated that you intended to
10 build a separate house.

11 A I intended to. I just can't afford it.

12 Q Do you have any reason to believe the association
13 would have approved the warehouse if you had not asked for
14 the construction of a residence to go with it?

15 A Would they approve it?

16 Q Yes.

17 A Yes.

18 Q Why do you say that?

19 A Because there's nothing in the CC&Rs that says you
20 can't.

21 Q What is prohibited in the CC&Rs?

22 A What do you mean what's prohibited?

23 Q Well, there seems to be a clear sense in your mind
24 about what you can and can not have. I want to know from
25 you what, what do you believe is clearly prohibited?

1 A Geodesic homes and A-frames.

2 Q Anything else?

3 A Um, no.

4 Q So any other type of home must be permitted in
5 your opinion in Chula Vista because it's not specifically
6 prohibited?

7 A Mobile homes.

8 Q Okay. Mobile homes, A-frames, and geodesic homes
9 are prohibited?

10 A Correct.

11 Q In your opinion, anything else the association
12 must approve?

13 A I think so, yes.

14 Q Have you lived in a HOA or community association
15 before Chula Vista?

16 A No.

17 MR. SMITH: I have no further questions, your
18 Honor.

19 THE COURT: Redirect?

20 MR. STACHEL: Yes, Judge.

21

22 EXAMINATION

23 BY MR. STACHEL:

24 Q Mr. Olson, turn to Exhibit 33. Do you have
25 Exhibit 33?

1 A Yes.

2 Q Do you recognize what that is?

3 A Yes.

4 Q What is it?

5 A It's my request for architectural review for the
6 stucco house and the shop, the steel building.

7 Q Does it say anywhere on there that it's a
8 contract?

9 A No.

10 Q Does it say anywhere there's that it's an
11 agreement?

12 A No.

13 Q In essence, you're simply asking the HOA to review
14 your request. Is that correct?

15 A Correct.

16 Q And at the end either to approve or disapprove, is
17 that correct?

18 A Correct.

19 Q Is there anything in this particular form or that
20 you have in the CC&Rs that requires you to build everything
21 on your request?

22 A I'm sorry. Say that again.

23 Q Is there anything on the form or in the CC&Rs that
24 requires you to build anything, or build everything, that is
25 in the request?

1 A No.

2 Q Are there any identifications of penalties should
3 you not build everything in the request?

4 A No.

5 Q You were asked some questions -- and I'm thinking
6 you were having some memory lapses, given the fact that I
7 know you. So I'm going to ask this again. What was it that
8 made you think that you could build a residence inside of
9 the steel structure? Let me ask you. Do you ever do any
10 traveling?

11 A Not much.

12 Q Do you ever visit relatives?

13 A Yes.

14 Q Know of any of them in the steel business?

15 A Yes.

16 Q Know any of them that live in these kinds of
17 units?

18 A Yes.

19 Q Who?

20 A My brother-in-law.

21 Q Okay. When did you visit him?

22 A Before we -- that's, that's kind of where we got
23 the idea to do this.

24 Q Okay. So where is he?

25 A In Bullhead City.

1 Q What's his name?

2 A Kelly Duran.

3 Q What does he do for a living?

4 A He's a steel contractor.

5 Q Okay. So when you went there, what did you see?

6 A He had a building like ours with a living quarters
7 in it.

8 Q Okay. And did that give you any ideas?

9 A Yes. I loved it.

10 Q So had you seen any others?

11 A Yes.

12 Q Were you involved in any of these others that you
13 might have seen from other relatives? Any others that have
14 them?

15 A What do you mean?

16 Q Let me back up. When you talked with your
17 brother-in-law, did he mention when you looked at his house
18 that this is not uncommon, or common?

19 A He said a lot of people are doing it.

20 THE COURT: When does this conversation take
21 place?

22 THE WITNESS: Um.

23 THE COURT: Before 2009 when you applied, or
24 after?

25 THE WITNESS: It was after that.

1 MR. STACHEL: And, Judge, if I can help, I'll help
2 out with some dates here.

3 BY MR. STACHEL:

4 Q When you were asked originally when you were
5 thinking of converting this -- pardon me. Not converting.
6 But going from the concept of being a temporary residence to
7 permanent, you mentioned two things in a row. You mentioned
8 fire and refinance. Do you recall that?

9 A Yes.

10 Q The fire was when?

11 A May of 2012.

12 Q When was the refinance?

13 Now it's not a trick question. We had the judge
14 actually look up the date. August of 2014. Do you recall
15 that?

16 A Yes.

17 Q So that's when you got the appraisal. So sometime
18 in that gap is it fair to say that you were considering
19 making this a permanent residence?

20 A Yes.

21 Q Okay.

22 MR. STACHEL: One question, Judge.

23 BY MR. STACHEL:

24 Q Rod, you were here earlier; and we talked about
25 the notices of violations and so forth. On November 8th you

1 received a letter regarding a cure. Okay. Was it
2 physically possible financially for you to abandon the 6,000
3 square foot structure?

4 A No.

5 Q You were asked to build another facility, build
6 another structure. Is that possible?

7 A No.

8 Q There was also some discussion by Ms. Cunningham
9 about putting stucco around the whole unit. Okay?

10 A Yes.

11 Q Okay. Did you look into the pricing of that?

12 A I didn't check into a full price. I just know
13 from building other houses that it's --

14 Q That's right. You were a contractor. Right?

15 A Correct.

16 Q So you know it?

17 A It's expensive, yes.

18 Q Was it more than you could afford?

19 A Yes.

20 MR. STACHEL: Okay. Nothing further, Judge.

21 Thank you.

22 MR. SMITH: Your Honor, if I may, there was some
23 new information that I'd like to follow up on.

24 THE COURT: I'll allow you to reopen.

25

1 EXAMINATION

2 BY MR. SMITH:

3 Q Mr. Olson, when did you visit your -- when did
4 your brother move? Is it Mohave County?

5 A Yes.

6 Q When did he move to Mohave County?

7 A I don't really know.

8 Q When did you visit his steel, steel house in
9 Mohave County?

10 A Well, I think it was, we were getting, having to
11 refinance everything; so it was probably '14, somewhere in
12 there, somewhere right before we refinanced.

13 Q When did you move to Arizona from North Dakota?

14 A Eighty-six.

15 Q When did your brother move to Arizona?

16 A My brother?

17 Q It wasn't your brother that lived in Mohave
18 County?

19 A My brother-in-law.

20 Q When did your brother-in-law move to Mohave
21 County?

22 A I don't know. I don't know when he moved. I
23 don't know.

24 Q I'm going to remind you that you are under oath.

25 A Yes.

1 Q But did you for the first time -- when did you
2 first visit your brother-in-law's house in Mohave County
3 specifically with respect to the process we're talking about
4 today, your 2009 application, your 2011 variance, and so
5 forth. When did you visit him?

6 A Close to when we were getting ready to -- I mean,
7 we would visit him. He didn't live in this structure the
8 whole time. So when we went up there and he was, and he had
9 his house, it was probably around the time we were going to
10 refinance, around '14.

11 Q How frequently did you visit them?

12 A Not very much.

13 Q Give me your best guess. How many times a year?

14 A I mean, probably once every two years.

15 Q Okay. So since 2009 you might have been there
16 three or four times?

17 A Probably.

18 Q Was his steel house there from the first time you
19 were visiting?

20 A No, no.

21 Q When did he build it?

22 A It was -- he was -- I think he built it right
23 before we went up there, so it was probably around 2014.

24 Q And it's your testimony that that's when you
25 became convinced that you were permanently going to reside

1 in this style structure?

2 A It gave me the idea, yes.

3 Q But you had already built out the improvements in
4 the house, correct?

5 A Yes, so we could live there.

6 Q Yeah. So when you got the idea from your
7 brother-in-law, you were already in fact living in a
8 residence in a steel structure?

9 A Right.

10 Q So what was going to change?

11 A It's just that I wouldn't have to build another
12 residence. I was happy with what I've got.

13 Q Was it just the idea that now you could tell the
14 association that you didn't mean to follow through on your
15 intention to build a separate house?

16 A No. I had every intention.

17 MR. SMITH: No further questions.

18 THE COURT: Any further recross -- or redirect?

19 MR. STACHEL: No, your Honor.

20 THE COURT: Thank you. You may step down.

21 And your next witness is going to be who,

22 Mr. Stachel?

23 MR. STACHEL: No further witnesses, Judge.

24 THE COURT: All right.

25 MR. STACHEL: We rest.

1 THE COURT: All right. So the plaintiffs rest at
2 this point.

3 MR. STACHEL: Yes, Judge.

4 THE COURT: Instead of starting the defense and
5 counterclaim case this afternoon, does it make sense to hold
6 off until morning?

7 MR. SMITH: Yes, your Honor.

8 MR. TENNESON: That's fine.

9 THE COURT: So we'll start back up, and we'll
10 adjourn until 9 a.m. Thank you.

11 (Proceeding adjourns.)

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I, Penny Nyander, Arizona Certified Reporter No.
50219, do hereby certify that the foregoing pages constitute
a full, accurate typewritten record of my stenographic notes
taken at said time and place, all done to the best of my
skill and ability.

DATED this 25th day of April, 2018.

Penny Nyander
Certified Court Reporter
Arizona Certified Reporter No. 50219